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In The

Supreme Court of the United States

WILLIAM C. DEWBERRY,

Petitioner,

vs.

TEXAS UTILITIES ELECTRIC COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an employment discrimination case under Title VII and Section 1981, does a *prima facie* case of discrimination, combined with evidence that the non-discriminatory reasons offered an employer are false, constitute evidence of intentional discrimination sufficient to survive a defense motion for summary judgment?

2. May the trial and appellate courts properly consider whether evidence of pretext is "strong" or "weak," or whether a *prima facie* case is "substantial," in deciding whether there is evidence of intentional discrimination sufficient to survive a defense motion for summary judgment?

3. What is the quantum of proof required to survive a defense motion for summary judgment in an employment discrimination case under Title VII and Section 1981?

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CITATIONS TO THE JUDGMENT AND OPINION TO BE REVIEWED

Dewberry v. Texas Utilities Electric Company,
No. 99-10912 (5th Cir. February 17, 2000) (per curiam)

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgment and opinion of the court of appeals pursuant to 28 U.S.C. §1254.

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were issued on February 17, 2000. This petition is filed within ninety days of that date as required by 28 U.S.C. §2101(c). Sup. Ct. R. 13.1.

THE STATUTES INVOLVED

42 U.S.C.S. §1981 provides:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance,

modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U. S. C. §2000e-2 provides:

(a) Employer practices.

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . .

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices.

Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any

employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

This is an employment discrimination case brought under Title VII of the Civil Rights Act of 1991, 42 U.S.C. §2000e; Section 1981, 42 U.S.C. §1981; and the Texas Commission on Human Rights Act, TEX. LABOR CODE §21.051 (Vernon 1996).

William Dewberry timely filed this suit in the United States District Court for the Northern District of Texas after receiving the requisite Dismissal and Notice of Rights from the Equal Employment Opportunity Commission. Dewberry, an African-American, alleged racial discrimination in the denial of three separate promotions. The district court had federal question jurisdiction over the case pursuant to 28 U.S.C. §1331.

The defendant, Texas Utilities Electric Company ("TU Electric"), filed a motion for summary judgment. The grounds alleged were: (1) the absence of a *prima facie* case of racial discrimination or retaliation; (2) the existence of a legitimate, non-discriminatory reason for Dewberry's failure to be promoted; and (3) the absence of evidence that the profferred reason was pretextual, and that the real reason was discrimination or retaliation.

The district court granted summary judgment for the defendant. For each of the three promotions at issue, the district court found that Dewberry had established a *prima facie* case of discrimination and/or retaliation, that

TU Electric had articulated a legitimate, non-discriminatory reason for Dewberry's failure to be promoted, and that there was no evidence that TU Electric's real reason was discrimination and/or retaliation.

The court of appeals issued a short memorandum opinion stating that the judgment was affirmed for the reasons stated in the district court's opinion.

The summary judgment evidence showed the following:

William Dewberry has been an employee of TU Electric and its predecessor company continuously since June 13, 1967, other than a brief absence to serve in the U.S. Military from October 15, 1968 to May 13, 1970. He has an Associates Degree in Electrical Technology. He is currently employed as a Senior Engineering Technician. He has held that title since July, 1991, but has had the same responsibilities under different titles since May, 1983. The job duties of a Senior Engineering Technician consist primarily of providing technical support and advice to distribution crews with respect to the construction, operation and maintenance of TU's electrical distribution systems, from the substation to the customer's meter.

Prior to the incidents that are the subject of this suit, Dewberry's most recent Performance Review and Appraisal was outstanding. His supervisor, Richie Croft, wrote that Dewberry "knows assigned responsibilities, needs little supervision or assistance." He also noted that Dewberry "makes adjustments as needed to accomplish assigned duties," and "Mr. Dewberry presents himself

well. Gets along with fellow employees." Dewberry's personnel file contained a number of letters from TU customers expressing their thanks and appreciation for jobs well-done. Although Dewberry was but one of eleven Senior Engineering Technicians in TU's Central Region, he had responsibility for 24% of TU's high-profile customers in that Region, while the other ten technicians had responsibility for the remaining 76%. His supervisor concluded that Dewberry was "ready for advancement." The Performance Review and Appraisal covered the period from August, 1996 through August, 1997.

In June, 1997, TU Electric created the new position of Lead Distribution Operations Technician (hereinafter, "Lead Technician") at each of the three service centers in the Central Region, in order to be consistent with TU's other four regions in the area. TU stated that the Lead Technician position would perform the technical work of the Senior Engineering Technician, plus some supervisory responsibilities such as assigning work to other technicians, evaluating other technicians, and resolving customer complaints. However, Dewberry's file showed that he had already done work resolving customer complaints. Moreover, TU admitted that 90% of the Lead Technician's job was the same as the Senior Engineering Technician. The Lead Technician position paid just $169 more per month. However, it was considered the highest step of progression in the technician classification, and was designed to afford technicians the opportunity to "acquire leadership and supervisory experience."

Because of the similarity between the positions, only the eleven Senior Engineering Technicians were interviewed for the Lead Technician positions. This decision

was contrary to TU's normal policy to post the position and make it available to other TU employees. It also allowed the interview panel to make its selections without the oversight of the personnel department.

The technicians considered consisted of eight white males, two black males and one black female. They were interviewed by a panel consisting of six white males. Three white males were selected to fill the positions.

In response to Dewberry's EEOC charges, TU stated that the candidates were selected primarily on their technical experience and skills and interpersonal skills, with emphasis on exemplified leadership skills. TU stated that Dewberry did not express his ideas well, which left doubt about his competency with regard to the technical aspects of his job, as well as his ability to communicate. In a letter to Dewberry about a month later, TU told him that his qualifications and knowledge of the job were comparable to that of the others. TU said only that his answers to interview questions lead to lower evaluations on leadership, interpersonal and communication skills. However, four of the six interviewers could only remember one question that Dewberry had been asked, and coincidentally, it was the same question they remembered.

In the course of this litigation, TU asserted that the interviewers also evaluated the candidates on the basis of their personal experience with them. One interviewer, Richard Reeves, claimed that his personal experience with Dewberry indicated that he was not as approachable as he needed to be to be an effective leader. Another interviewer, Gary Roberts, also said that his personal experience was that Dewberry needed to be more

approachable, and added that each successful candidate had more technician experience. Debbie Morton, TU's Senior Human Resources Representative, said only that the successful candidates had held the technician job classification longer, ignoring the fact that Dewberry had long done the same work under a different classification. Dewberry had been with TU longer than the successful candidates, and had held far more technical responsibility in terms of the number of feeders, substations and capacitor banks he oversaw. When Dewberry asked Richie Croft, his direct supervisor and one of the interviewers, how he could improve his performance review rating Croft stated that he would have to "walk on water, or at least know where the rocks are."

In November, 1997, TU posted an opening for a Distribution Operations Supervisor in the Arlington Region. The posted job notice identified the required qualifications as a two-year technical degree or equivalent work experience, and knowledge of other job-related information. There was no mention of supervisory experience being required. TU admits that the job posting listed the "minimum qualifications" for the position.

The person responsible for selecting the Distribution Supervisor was Richard Reeves, the same individual who had been involved in selecting the Lead Technicians in the Central Region. Approximately thirty-seven people applied for the position, including Mr. Dewberry.

Reeves initially decided to interview only nine of the applicants, none of whom were African-American. Reeves stated that this was done to narrow the pool to those having prior supervisory experience. It was only

after discussions with Debbie Morton, TU's Senior Human Resources Representative, that Reeves decided to interview Moses Ward, a black male. However, Ward had not even applied for the position, and did not have the supervisory experience Reeves claimed was necessary. Reeves selected a white male as the successful candidate. Shortly thereafter, TU also promoted into a Distribution Supervisor's position another white male who lacked both supervisory experience and a degree.

An opening for a Lead Technician in Mesquite occurred in or around April, 1998. Eighteen TU employees, including Dewberry, applied for the position, and TU decided to interview eleven of the applicants. The interview panel chose Dennis Norman, a white male, to fill the position. Unlike Dewberry, Mr. Norman did not have an associate degree. Norman also lacked the experience in a high-density distribution area that Dewberry had. Dewberry also had more years of experience as a technician than did Norman. TU stated that it was Dewberry's actions during his interview that caused TU not to promote him. Dewberry allegedly refused to answer questions and instead referred the interview panel to his personnel file. However, Dewberry disputes this account of the interview. Dewberry answered the questions asked, and then referred the panel to his personnel file for verification.

Two of the three interviewers for the Mesquite Lead Technician position, Gilbert Rascon and Kyle Davis, had a conversation with Debbie Dennis about Dewberry's prior complaint to the EEOC. Rascon and Davis both testified that they spoke to her either the same day after the interview or the next morning. Although both denied that

this information affected their selection process, Davis had already made a special effort to record the interview with Dewberry. Coincidentally, Davis had also spoken to Dewberry's supervisor, Richie Croft, *before* the interview. Davis reported only that Croft had told him that Dewberry did not "interview well."

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals are Divided on the Quantum of Proof Required to Survive a Motion for Summary Judgment under Title VII and Section 1981.

A. The Circuits Disagree on How to Apply *Hicks* in a Summary Judgment Context.

Dewberry alleged causes of action under Title VII of the Civil Rights Act of 1991, 42 U.S.C. §2000e; Section 1981, 42 U.S.C. §1981; and the Texas Commission on Human Rights Act, TEX. LABOR CODE §21.051 (Vernon 1996). The district court correctly observed that the elements required for each are essentially the same. (See Appendix B). *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 603, 139 L. Ed. 2d 491 (1997).

The shifting burdens of production in employment discrimination cases are well-established. First, the plaintiff must establish a *prima facie* case of discrimination; second, if he is so successful, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant is so successful, the inference of discrimination

raised by the prima facie case disappears, and the plaintiff then must prove, by a preponderance of the evidence, both that the defendant's articulated reason is false and that the defendant intentionally discriminated. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11, 113 S. Ct. 2742, 2748-49, 125 L. Ed. 2d 407 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-55, 101 S. Ct. 1089, 1093-94, 67 L. Ed. 2d 207 (1981).

This Court's decision in *Hicks* involved the review of a final judgment after trial. However, the circuit courts are in disagreement about how to apply *Hicks* to a defense motion for summary judgment. The disposition of this case by the lower courts was governed by the Fifth Circuit's prior opinion in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (en banc). Petitioner will show that the Fifth Circuit has construed *Hicks* in a manner that is inconsistent with both the basic summary judgment standard of review and with the majority of circuits that have considered the issue.

B. The District Court Correctly Found the Existence of a *Prima Facie* Case

To establish a *prima facie* case of discriminatory failure to promote, Dewberry must introduce evidence: (1) that he belongs to a group protected by Title VII; (2) that he was qualified for the job; (3) that he was not promoted; and (4) that TU Electric promoted a person who is not in his protected class. *Gonzales v. Carlin*, 907 F.2d 573, 578 (5th Cir. 1990).

The district court correctly found that Dewberry had introduced evidence to support a *prima facie* case with

respect to each of the three promotions he sought. (See Appendix B).

C. TU Electric's Articulated Non-Discriminatory Reasons are False

Dewberry did not dispute, for purposes of the summary judgment hearing only, that the reasons given by TU Electric for not promoting him would, if believed by a jury, constitute non-discriminatory reasons. Consequently, the sole remaining issue was to determine the quantum of proof necessary to create a fact issue on whether TU Electric's articulated reasons were a pretext for discrimination.

Inconsistencies in the movant's summary judgment evidence on a material fact create obvious questions of credibility and a fact question inappropriate for summary judgment. *Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315, 320 (5th Cir. 1997). A plaintiff may demonstrate pretext by showing that the employer's explanation is unworthy of credence. *Walton v. Bisco Industries, Inc.*, 119 F.3d 368, 370 (5th Cir. 1997).

The nondiscriminatory reasons proffered by TU Electric for Dewberry's non-promotion are riddled with inconsistencies to the point where a reasonable person could conclude that they were completely fabricated. TU argued that Dewberry lacked necessary leadership skills, but said that the lead technician posts were designed to allow technical people to *acquire* leadership skills. TU also identified resolving customer complaints as one of the management or leadership skills that distinguished the

new job from Dewberry's present position, but Dewberry's file showed that he was already successfully doing that.

TU fabricated an incident where Dewberry was alleged to have been "rude and confrontational" in a leadership training course a few years before the interviews. Not only did Dewberry deny that this took place, but TU's own written evaluation of Dewberry said that he got along well with others. TU also said that he did not express himself well, and that the promotion were based solely on the interviews. The truth is that the interviewers for the most part did not remember the interview (they all recalled only the same, single question, suggesting collusion), and all admitted basing their decisions on their own personal experiences.

TU wrote that it had "doubt[s] about his competency with regard to the technical aspects of his job," even though five of the six interviewers never looked at his personnel file. A month later, TU wrote Dewberry and said his qualifications and knowledge of the job were comparable to that of the others. At exactly the same time that Dewberry was seeking promotion, his supervisor wrote an evaluation that he was "ready for advancement." In response to questions about Dewberry's non-promotion, however, *the same individual* said that, in order for Dewberry to advance, he'd have to "walk on water, or at least know where the rocks are."

Clearly, the truth is not being told.

Much the same thing happened with the distribution supervisor position. TU claimed that supervisory experience was "essential," and that they excluded candidates

without supervisory experience from the interview pool. However, the job notice listing the "qualifications" for the job made no mention of this requirement. When an original, all-white interview pool was selected, a token African-American was added, but that individual did not have supervisory experience, thereby impeaching the very "requirement" that TU used to excuse the exclusion of African-Americans in the first place. The "requirement" of supervisory experience was also shown to be pretextual when TU soon after promoted Don Shipley, a person without supervisory experience and without an associate degree, to the same job classification.

Neither the district court nor the Fifth Circuit found it necessary to determine whether there was a fact issue on whether TU's articulated reasons were false. Citing the Fifth Circuit's opinion in *Rhodes*, the district court concluded that Dewberry was required to introduce affirmative evidence of a racial motivation, and that he failed to do so. (*See* Appendix B, A-14).

D. The Circuits are Divided on What Constitutes Sufficient Evidence of Discrimination to Survive Summary Judgment

The third element of Dewberry's claim requires him to prove, at trial, both that TU's articulated reason is false and that the defendant intentionally discriminated. *Hicks*, 509 U.S. at 510-11. A plaintiff may establish circumstantial evidence of intentional discrimination by demonstrating that a defendant's articulated nondiscriminatory rationale was pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 1825, 36 L. Ed. 2d 668

(1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981).

A plurality of the circuit courts have construed this Court's decision in *Hicks* to mean that a plaintiff with a *prima facie* case can always succeed in fending off summary judgment if he can demonstrate a genuine issue of material fact as to whether the employer's stated reason for its employment decision is false. *See, e.g., Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1066-72 (3d Cir. 1996) (en banc); *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 342-47 (6th Cir. 1997); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995).

These Circuits also hold that inconsistencies in the employer's summary judgment evidence about its proffered reason are sufficient to create a fact issue on pretext, and thus defeat summary judgment. *McGarry v. Board Of County Comm'rs Of Pitkin*, 175 F.3d 1193, 1202 (10th Cir. 1999); *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1270 (11th Cir. 1999); *Reeves v. Johnson Controls World Servs.*; 140 F.3d 144, 157 (2nd Cir. 1998); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 900 (3d Cir. 1987) (en banc).

The principal support for the position held by these circuits derives from the following passage in *Hicks*:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer

> the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, no additional proof of discrimination is required. But the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule [of Evidence] 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'

St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 511 (citations omitted).

The Fifth Circuit, perhaps focusing on an ambiguity in this Court's statement that disbelief, plus a *prima facie* case, "may . . . suffice" to show intentional discrimination, has instead sought to distinguish a "subset of cases" in which disbelief plus a *prima facie* case is sufficient, from those in which it is insufficient as a matter of law, justifying summary judgment (the so-called "pretext-plus" cases). *Ontiveros v. Asarco Inc.*, 83 F.3d 732, 734 (5th Cir.1996); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (en banc). To make this distinction, the Fifth Circuit looks to determine whether the evidence of fabrication is "strong," and whether or not the *prima facie* case is "substantial." *Rhodes*, 75 F.3d at 994.

The Court of Appeals for the District of Columbia also holds that evidence of pretext plus a *prima facie* case will not always suffice to defeat summary judgment. *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1290 n.4 (D.C. Cir. 1998) (en banc). The difference between the position of the Fifth Circuit and that of the D.C. Circuit is one of

degree only. The D.C. Circuit gives evidence of pretext "substantial weight" that will almost always defeat summary judgment, but notes two exceptions where this would not be true. *Id.*

The first "exception" recognized by the D.C. Circuit involves "a case in which the plaintiff calls the employer's explanation into question, but does so in a way that conclusively demonstrates that the real explanation for the employer's behavior is not discrimination, but some other motivation." *Aka v. Washington Hosp. Ctr.*, 156 F.3d at 1291. This exception, however, is consistent with the plurality rule. Evidence of pretext, plus a *prima facie* case, can generally *permit* an inference of intentional discrimination, even though there is always the possibility that other evidence might negate that inference and justify summary judgment.

This exception is also entirely consistent with the traditional rule that a defendant is entitled to summary judgment if it negates an essential element of the plaintiff's claim. *See, e.g., American Economy Ins. Co. v. Tomlinson*, 12 F.3d 505, 507 (5th Cir. 1994).

The second exception recognized by the D.C. Circuit, however, is similar to the rule adopted by the Fifth Circuit: "there may be no legitimate jury question as to discrimination in a case in which a plaintiff has *created only a weak issue of material fact* as to whether the employer's explanation is untrue, and there is abundant independent evidence in the record that no discrimination has occurred." *Aka v. Washington Hosp. Ctr.*, 156 F.3d at 1291 (emphasis added).

The view held by the D.C. and Fifth Circuits is fundamentally inconsistent with that of the Third, Sixth, Seventh, Ninth and Tenth Circuits. Dewberry would clearly prevail under the plurality rule, because the evidence regarding TU's articulated reasons for its employment decisions is replete with inconsistencies and contradictions. For the Fifth Circuit, however, this is not enough. The lower courts in this case required, in addition to a fact issue on pretext, affirmative evidence that "the real reason he was not promoted . . . was because of race." (*See* Appendix B, A-14).

II. The Fifth Circuit Rule is Inconsistent with This Court's Opinion in *Hicks*

It is respectfully submitted that the Fifth Circuit has misapplied *Hicks* in the summary judgment context. Its decision in *Rhodes* erroneously focuses on the holding that a plaintiff cannot *obtain judgment* by proving only that the defendant's proffered reason is pretextual. *Hicks*, 509 U.S. at 515. In a footnote, the Fifth Circuit expressly noted that the standard for granting the Rule 50 motion for judgment in *Hicks* is the same standard for granting a Rule 56 motion for summary judgment. *Rhodes*, 75 F.3d at 993 n. 4. Because of this alleged similarity, the Fifth Circuit in *Rhodes* concluded that *Hicks* required a summary judgment respondent to introduce proof of racial motive in addition to evidence of pretext.

Regrettably, the Fifth Circuit's *en banc* decision in *Rhodes* applied a faulty analysis when comparing the procedural posture in *Hicks* to a motion for summary judgment. *Hicks* involved a bench trial in which the finder of fact found pretext, but no racial motive. *Hicks*, 509 U.S. at 508. This Court merely held that both findings were required to support a judgment for plaintiff. *Hicks*, 509 U.S. at 510-11. More significantly, this Court held that evidence of pretext *may* support a finding of racial discrimination, but that such an inference was not legally compelled. *Hicks*, 509 U.S. at 511. The Fifth Circuit has failed to distinguish between the findings needed for entry of judgment after trial, and the quantum of proof needed to create a fact issue. This distinction was best and most recently explained by the D.C. Circuit:

> Contrary to the dissent's confusion-producing analysis, there is nothing whatsoever inconsistent between this statement and our later statements that (1) the plaintiff must show 'both that the reason was false, and that discrimination was the real reason,' and (2) 'it is not enough . . . to disbelieve the employer.' Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination.

Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1290 n.4 (D.C. Cir. 1998) (en banc).

In other words, while *Hicks* emphasized the need for a separate finding of intentional discrimination to support a final judgment, it clearly implies that disbelief of an employer's proffered reason, combined with a *prima*

facie case, is sufficient to create a fact issue on discrimination and avoid summary judgment.

III. The Fifth Circuit Rule is Inconsistent with the Well-Established Standards for Summary Judgment

Although the Fifth Circuit routinely requires proof of racial motivation in addition to evidence of pretext before allowing a case to proceed to trial, it recognizes, in theory, a "subset of cases" in which disbelief plus a *prima facie* case is sufficient to survive a defense motion for summary judgment.[1] *Rhodes*, 75 F.3d at 994. To make this distinction, the Fifth Circuit looks to determine whether the evidence of fabrication is "strong," and whether or not the *prima facie* case is "substantial." *Id.* Such a determination is fundamentally inconsistent with the well-established standards for summary judgment.

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[1] It is worth noting that the lower courts in this case never considered whether Dewberry's case fell within this "subset of cases," although they were asked to do so. The evidence of Dewberry's *prima facie* case is particularly substantial and should, combined with the evidence of pretext, permit an inference of racial motivation. This case involves an all-white hiring committee which intentionally bypassed TU's personnel department, then passed over African-Americans making up more than a quarter of the hiring pool, in order to give promotions to more than a quarter of the hiring pool. It also involves a single individual who originally didn't want to interview an African-American for the supervisor post, and who passed up all three African-Americans in a pool of only eleven for the three lead technician posts. These facts contrast sharply with the hypothetical example of a "weak" *prima facie* case described in *Hicks*. *Cf. Hicks*, 509 U.S. at 513.

Neither the district courts nor the circuit courts have any business distinguishing between "weak" fact issues and "strong" fact issues on a motion for summary judgment, especially in determining a question as subjective as discriminatory intent. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (court should not weigh evidence on summary judgment).

This Court has recently said, in a redistricting case, that extremely minimal evidence (the shape and lack of compactness of a district) permitted an inference of racial motivation, while the State's nonracial explanation permitted an inference of a political motivation. Where both inferences are possible, there is a fact issue inappropriate for summary judgment. *Hunt v. Cromartie*, 526 U.S. 541; 119 S. Ct. 1545, 1552; 143 L. Ed. 2d 731, 742 (1999). Questions of credibility and the weighing of evidence were functions of the jury, and should not be done on summary judgment. *Id.*; *Anderson*, 477 U.S. at 249.

This language parallels the holding in *Hicks* that the falsity of an employer's proffered reason, plus the facts of the prima facie case, *permit* an inference of intentional discrimination but do not compel one. The fact finder may infer a discriminatory or a nondiscriminatory motive. For the same reasons it expressed in *Hunt v. Cromartie*, this Court should hold that the issue of motive under such circumstances is inappropriate for summary judgment.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, petitioner prays that this Court grant this petition, and that upon final hearing it reverse the judgment of the Fifth Circuit and the trial court and remand this case for trial on the merits.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-10912
Summary Calendar

WILLIAM C DEWBERRY,

Plaintiff-Appellant,

VERSUS

TEXAS UTILITIES ELECTRIC COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas, Dallas Division

(3:98-CV-1889-G)

(Filed FEB 17 2000)

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:*

William C. Dewberry appeals the district court's grant of summary judgment for Texas Utilities Electric

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Company dismissing Dewberry's claims of race discrimination and retaliation. The claims arose out of Dewberry's employment with Texas Utilities and its decisions to not promote Dewberry to any of three positions. Having carefully reviewed the record and studied the briefs of counsel, we AFFIRM for essentially the reasons set forth by the district court in its Memorandum Order dated July 15, 1999.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM C. DEWBERRY, Plaintiff, VS. TEXAS UTILITIES ELECTRIC COMPANY, Defendant.	)	CIVIL ACTION NO. 3:98-CV-1889-G

MEMORANDUM ORDER

(Filed Jul. 15, 1999)

Before the court is the motion of the defendant Texas Utilities Electric Company ("TU Electric") for summary judgment. For the reasons stated below, the motion is granted.

I. BACKGROUND

Plaintiff William C. Dewberry ("Dewberry"), an African-American male, has been employed by TU Electric, or its predecessor, for over thirty-two years.[1] See Plaintiff William C. Dewberry's Brief in Support of His Response to Defendant Texas Utilities Electric Company's Motion for Summary judgment ("Plaintiff's Brief") at 1. Since

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[1] Dewberry was hired by TU Electric's predecessor, Dallas Power & Light, on June 13, 1967. *See* Defendant Texas Utilities Electric Company's Brief in Support of Its Motion for Summary Judgment at 2.

July 1991, Dewberry has worked for TU Electric as a Senior Engineering Technician. *See* Plaintiff's Brief at 1; Defendant Texas Utilities Electric Company's Brief in Support of Its Motion for Summary Judgment ("Defendant's Brief") at 2. Between June 1997 and May 1998, Dewberry unsuccessfully sought three promotions within TU Electric. *See* Plaintiff's Brief at 1; Defendant's Brief at 2-3. The facts surrounding these three attempts at promotion form the basis of this lawsuit.

In the Spring of 1997, TU Electric created three new positions of Distribution Operations Lead Technician in the Central Region (the "Lead Technician positions"). *See* Defendant's Brief at 3-4; Plaintiff's Brief at 7. In filling these new positions, TU Electric interviewed all the Senior Engineering Technicians, including Dewberry, who were working in the Central Region at the time. Defendant's Brief at 4-5; Plaintiff's Brief at 7. TU Electric ultimately selected three white males to fill the new Lead Technician positions. *See* Plaintiff's Brief at 7-8. After learning that he had not been selected for one of the new positions, Dewberrry [sic] complained to several TU Electric management officials that he thought the selection process was unfair and discriminatory.[2] *See* Defendant's Brief at 10-13.

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[2] On July 21, 1997 Dewberry met with Gary Roberts, Manager of the Central Region, to discuss what he felt were the "shortcomings" in the selection process for the Lead Technician position. *See* Defendant's Brief at 10. On July 30, 1997, Dewberry shared the same concerns with Paul Williams, Vice President of Distribution and Roberts' immediate supervisor. See *id.* at 11-12. On August 19, 1997, Dewberry sent an internal e-mail to Earl Nye, the Chairman of the Board and Chief Executive Officer of

Dewberry alleges that he was not promoted to one of the new Lead Technician positions because of his race. *See* Plaintiff's Brief at 8. TU Electric maintains, however, that Dewberry was not promoted because he failed to demonstrate effective communication skills and potential leadership abilities during the interview and because the candidates who were selected to fill the new positions had more years of experience in the technician job classification than Dewberry. *See* Defendant's Brief at 7-8.

In November 1997, TU Electric had an opening for a Distribution Operations Supervisor in the Arlington Service Center (the "Arlington position"). *See* Defendant's Brief at 13. Approximately thirty-seven people, including Dewberry, applied for the position. *See* Defendant's Brief at 14; Plaintiff's Brief at 8. TU Electric, however, declined to interview Dewberry for the Arlington position because he had no prior experience in a lead or supervisory capacity. *See* Defendant's Brief at 15. Dewberry alleges, however, that supervisory experience was not one of the required qualifications and that the real reason he was not considered for the Arlington position was his race. *See* Plaintiff's Brief at 8-9. Dewberry also claims that TU Electric refused to consider him for the Arlington position in retaliation for his earlier complaints about the selection process for the Lead Technician positions. See *id.* at 10.

Texas Utilities Company, requesting that Mr. Nye review the selection process for the Lead Technician position. See *id.* at 12. Finally, on September 29, 1997, Dewberry met with Debbie Dennis, TU Electric's Human Resources Support and Diversity Manager, to discuss his concerns about the selection process. See *id.* at 13.

On February 19, 1998, approximately one month after learning that he had not been selected for the Arlington position, Dewberry filed a charge of discrimination (the "February 1998 charge") with the Equal Employment Opportunity Commission ("EEOC"), alleging that he was not promoted to the Arlington position because of his race, in violation of Title VII and the TCHRA. *See* Defendant's Brief at 19. The EEOC issued a right-to-sue letter to Dewberry on May 20, 1998. See *id.*

In April 1998, TU Electric had an opening for a Lead Distribution Operations Technician at the Mesquite Service Center (the "Mesquite position"). See Defendant's Brief at 15; Plaintiff's Brief at 10. TU Electric interviewed eleven people, including Dewberry, for the position. *See* Defendant's Brief at 16; Plaintiff's Brief at 10. After completing all the interviews, TU Electric chose a white male to fill the position. *See* Plaintiff's Brief at 10-11. Dewberry alleges that he was not promoted to the Mesquite position because of his race and in retaliation for his earlier complaints regarding the Lead Technician position and for filing the February 1998 charge of discrimination with the EEOC. See *id.* TU Electric maintains, however, that Dewberry was not selected for the Mesquite position because he behaved in a "rude, confrontational, and non-responsive" manner during the interview. *See* Defendant's Brief at 17.

On June 5, 1998, Dewberry filed a second charge of discrimination (the "June 1998 charge") with the EEOC, alleging that he was not promoted to the Mesquite position because of his race and in retaliation for his prior complaints of discrimination. *See* Defendant's Brief at 19.

The EEOC issued a right-to-sue letter to Dewberry on June 22, 1998. See *id.*

Dewberry filed the instant lawsuit on August 11, 1998, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"); the Civil Rights Act of 1991, as amended, 42 U.S.C. § 1981 ("Section 1981"); and the Texas Commission on Human Rights Act, TEX. LAB. CODE ANN. § 21.001 *et seq.* (Vernon 1996) ("TCHRA"). *See* Plaintiff's First Amended Original Complaint ¶¶ 19, 24, and 29. In his complaint, Dewberry alleges that he was denied promotion to (1) the Lead Technician position, (2) the Arlington position, and (3) the Mesquite position on the basis of his race, color, and national origin. See *id.* With respect to the Arlington and Mesquite positions, Dewberry further alleges that he was denied these promotions in retaliation for complaining to TU Electric management officials about the selection process for the Lead Technician position and for filing the February 1998 charge of discrimination with the EEOC. See *id.*

TU Electric filed the instant motion for summary judgment on April 23, 1999. Dewberry has responded, TU Electric has replied, and the motion is now ripe for decision.

II. ANALYSIS

A. Evidentiary Burdens on Motion for Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled

to judgment as a matter of law. FED. R. CIV. P. 56(c).[3] "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A movant for summary judgment makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues to support the nonmovant's case. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). The pleadings, depositions, admissions, and affidavits, if any, must demonstrate that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c).

Once the movant makes this showing, the nonmovant may not rest on the allegations in his pleadings. *Celotex*, 477 U.S. at 324; Fed. R. Civ. P. 56(e). Rather, he must direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324. To carry this burden, the "opponent must do more than simply show . . . some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986). Instead, the nonmovant must present evidence sufficient to support a

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[3] The disposition of a case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th Cir. 1986).

resolution of the factual issue in his favor. *Anderson*, 477 U.S. at 257.

While all of the evidence must be viewed in a light most favorable to Dewberry as the motion's opponent, *id.* at 255 (citing *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 158-59 (1970)), neither conclusory allegations nor unsubstantiated assertions will satisfy his summary judgment burden. *Little v. Liquid Air Corporation*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). Summary judgment in favor of TU Electric is proper if, after adequate time for discovery, Dewberry fails to establish the existence of an element essential to his case and as to which he will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23.

B. Discussion of Dewberry's Claims

In his complaint, Dewberry alleges that TU Electric discriminated against him due to his race and retaliated against him in violation of Title VII, Section 1981, and the TCHRA. Although each of these statutes provides a separate cause of action, the evidentiary framework to make out a claim for relief under any of them is the same. *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir.) (Title VII and § 1981), *cert. denied*, ___ U.S. ___, 118 S.Ct. 603, 139 L.Ed.2d 491 (1997); *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 448 n.2 (5th Cir. 1996) (Title VII and § 1981); *Farrington v. Sysco Food Services, Inc.*, 865 S.W.2d 247, 251 (Tex. App. – Houston [1st Dist.] 1993, writ denied) (Title VII and the TCHRA); *City of Austin v. Gifford*, 824 S.W.2d 735, 738-39 (Tex. App. – Austin 1992, no writ) (Title VII

and the TCHRA). The court will thus engage in the same analysis for all of these claims.

1. Race Discrimination

The court applies the burden shifting framework utilized by the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), to analyze Dewberry's claims of race discrimination in employment. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).[4]

Because Dewberry has alleged a discriminatory failure to promote, he must initially establish a *prima facie* case by offering evidence (1) that he belongs to a group protected by Title VII; (2) that he was qualified for the job; (3) that he was not promoted; and (4) that TU Electric promoted a person who is not in his protected class. *Gonzalez v. Carlin*, 907 F.2d 573, 578 (5th Cir.1990); *Bernard v. Gulf Oil Corporation*, 890 F.2d 735, 745 (5th Cir.1989), *cert. denied*, 497 U.S. 1003 (1990).

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[4] This framework is well known:

> First, the plaintiff must establish a *prima facie* case of discrimination; second, if he is so successful, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant is so successful, the inference of discrimination raised by the *prima facie* case disappears, and the plaintiff then must prove, by a preponderance of the evidence, both that the defendant's articulated reason is false and that the defendant intentionally discriminated.

Walton v. Bisco Industries, Inc., 119 F.3d 368, 370 (5th Cir. 1997).

Once Dewberry establishes a *prima facie* case, an inference of discrimination arises, and TU Electric must articulate a legitimate, non-discriminatory reason for the failure to promote. See *Grimes v. Texas Department of Mental Health and Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996); *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996); *Bernard*, 890 F.2d at 745. If TU Electric satisfies this burden of production, Dewberry bears the ultimate burden of proving discrimination by showing that the reason offered is a pretext for prohibited discrimination. *Grimes*, 102 F.3d at 140; *Williams*, 98 F.3d at 181; *Bernard*, 890 F.2d at 745.

To avoid summary judgment at the third-step of the analysis, Dewberry must produce evidence from which a reasonable factfinder could find that TU Electric's stated reason was not the true reason for its decision not to promote Dewberry and that unlawful discrimination was. See *Grimes*, 102 F.3d at 141; *Williams*, 98 F.3d at 181. The Fifth Circuit has set forth the following standard regarding proof of pretext:

> [A] jury issue will be presented and a plaintiff can avoid summary judgment . . . if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [the protected trait] was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the [adverse employment action] was discriminatory.

Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir.1996) (en banc); see also *Williams*, 98 F.3d at 181-83 (quoting *Rhodes* standard and applying it in Title VII summary judgment context). "*Rhodes* makes clear that a plaintiff must present evidence sufficient to create a reasonable inference of discriminatory intent in order to avoid summary judgment." *Grimes*, 102 F.3d at 141; *LaPierre*, 86 F.3d at 450.

a. *The Lead Technician Positions*

In claiming that TU Electric discriminatorily refused to promote him to one of the new Lead Technician positions in the Central Region, Dewberry asserts (1) that he is an African-American and thus is a member of a protected group; (2) that he was qualified for a Lead Technician position; (3) that he was not promoted to a Lead Technician position; and (4) that TU Electric promoted three white males to the new Lead Technician positions. *See* Plaintiff's Brief at 7-8. TU Electric does not contest these facts. *See* Defendant's Brief at 23 (conceding that Dewberry has established a *prima facie* case of discrimination with respect to the Lead Technician position). Therefore, the court concludes that Dewberry has established a *prima facie* case of discrimination with respect to the Lead Technician positions.

With respect to its burden to articulate a legitimate, nondiscriminatory reason for not promoting Dewberry to one of the Lead Technician positions, TU Electric presented evidence that Dewberry was not promoted because the members of the interview panel determined

that Dewberry was not among the most qualified candidates for the position. *See* Defendant's Brief at 23. Specifically, TU Electric asserts that the interview panel concluded that, compared to Dewberry, the three white candidates who were promoted to the new Lead Technician positions had superior communication skills, leadership abilities, and job knowledge and experience. See *id.* at 23-24. Dewberry accepts this reason as a legitimate, non-discriminatory reason that satisfies TU Electric's burden of production. *See* Plaintiff's Brief at 12. Thus, the court concludes that TU Electric has articulated a legitimate, nondiscriminatory reason for refusing to promote Dewberry to one of the new Lead Technician positions. See *Grimes*, 102 F.3d at 141, 143 (holding that an employer's belief that another employee had "better communication skills, better supervisory skills" and "better program development experience" than the plaintiff was a legitimate reason for the employer's decision not to promote the plaintiff); see also *Stewart v. Houston Lighting & Power Co.*, 998 F.Supp. 746, 753 (S.D. Tex. 1998) (holding that an employee's lack of comparable qualifications constitutes a legitimate, non-discriminatory reason for the denial of an opportunity for promotion).

Because TU Electric has articulated a legitimate, non-discriminatory reason for its failure to promote Dewberry to the Lead Technician position, the burden shifts to Dewberry to prove that TU Electric's proffered reason is a mere pretext. As stated above, in order to avoid summary judgment at this stage, Dewberry must present evidence sufficient to create a reasonable inference of discriminatory intent on the part of TU Electric. See *Grimes*, 102 F.3d at 141.

The summary judgment evidence in this case completely fails to create a reasonable inference that race was a determinative factor in TU Electric's decision not to promote Dewberry to the Lead Technician position. In deposition testimony, Dewberry admits that he has no facts that support his contention that the members of the interview panel based their decision not to promote him on his race. *See* Transcript of Videotaped Oral Deposition of William C. Dewberry ("Dewberry Depo.") at page 213, lines 24-25 through page 214, lines 1-4, in Appendix of Evidence in Support of Defendant Texas Utilities Electric Company's Motion for Summary Judgment ("Defendant's Appendix") at 351-52. The only "proof" Dewberry can point to as evidence of TU Electric's discriminatory intent is his own subjective belief that he was discriminated against on the basis of race. Such a belief, however genuine, simply cannot be the basis for judicial relief. See *Price v. Marathon Cheese Corporation*, 119 F.3d 330, 337 (5th Cir. 1997); see also *Douglass v. United Service Automobile Association*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc) ("It is more than well-settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion").

Because Dewberry cannot point to any evidence that his race was the real reason for TU Electric's failure to promote him, TU Electric is entitled to summary judgment on Dewberry's claim of discrimination with respect to his failure to be promoted to the Lead Technician position. See *Rhodes*, 75 F.3d at 994; see also *Grimes*, 102 F.3d at 139-40 (holding that to survive a motion for summary judgment it is "incumbent upon the non-moving

party to present evidence – not just conjecture and speculation – that the defendant retaliated and discriminated against plaintiff on the basis of [his] race") (citations omitted); *Bowens v. University of Texas Southwestern Medical Center*, 1998 WL 292837, at *4-5 (N.D. Tex. May 29, 1998) (holding that a plaintiff could not survive a motion for summary judgment where the plaintiff's only proof of pretext was the proof supporting his *prima facie* case and his bald assertion that he was the victim of discrimination), *aff'd*, 170 F.3d 184 (5th Cir. 1999) (table).

b. *The Arlington Position*

With respect to the Arlington position, Dewberry asserts (1) that he is a member of a protected group, African-American; (2) that he was qualified for the Arlington position; (3) that he was not promoted to the Arlington position; and (4) that TU Electric promoted a white male to the position. *See* Plaintiff's Brief at 8-9. TU Electric argues, however, that Dewberry has failed to establish a *prima facie* case of discrimination with respect to the Arlington position because Dewberry was not qualified for the position in that he lacked prior supervisory or lead experience. *See* Defendant's Brief at 32.

Dewberry maintains, however, that prior supervisory experience was not a requirement of the Arlington position. In support of his contention, Dewberry presents the job posting for the Arlington position, which lists the following qualifications:

> Two year Technical Degree (Associates) or equivalent work experience. Knowledge of distribution system design, construction, standards, operations and maintenance practices, materials and equipment, environmental standards and regulations, safety handbook and the distribution emergency restoration plan.

See Plaintiff William C. Dewberry's 115 Page Appendix of Evidence in Support of His Response (and Brief) to Defendant Texas Utilities Electric Company's Motion for Summary Judgment ("Plaintiff's Appendix") at 44. Dewberry points out that nothing in the job posting lists prior supervisory experience as a requirement of the position. As TU Electric does not challenge the fact that Dewberry had the required Associates Degree or the required knowledge, Dewberry's evidence is sufficient to establish a genuine issue of material fact as to whether he was qualified for the Arlington position. The court therefore concludes that Dewberry has established a *prima facie* case of discrimination with respect to TU Electric's refusal to promote him to the Arlington position. See *Thornbrough v. Columbus and Greenville Railroad Company*, 760 F.2d 633, 639 (5th Cir.1985) (holding that employment discrimination plaintiffs need only make a minimal showing in order to establish a *prima facie* case).

In attempting to articulate a legitimate, non-discriminatory reason for not promoting Dewberry to the Arlington Position, TU Electric has produced evidence that it declined to interview Dewberry because he lacked prior supervisory experience. *See* Defendant's Brief at 33. Dewberry concedes that this reason constitutes a legitimate, non-discriminatory reason for failing to promote

him to the Arlington position. *See* Plaintiff's Brief at 12-13. The court likewise concludes that TU Electric has articulated a legitimate, nondiscriminatory reason for refusing to promote Dewberry to the Arlington position.

Because TU Electric has articulated a legitimate, nondiscriminatory reason for its failure to promote Dewberry to the Arlington position, the burden shifts to Dewberry to prove that TU Electric's proffered reason is a mere pretext. Again, the court must consider whether Dewberry has presented evidence sufficient to create a reasonable inference of discriminatory intent on the part of TU Electric. See *Grimes*, 102 F.3d at 141.

Dewberry has presented no evidence of racial animus to support his claim that he was denied the promotion to the Arlington position based on his race. Again, in deposition testimony, he admits that he has no facts to support his discrimination claim. *See* Dewberry Depo. at page 230, lines 1-11 and page 231, lines 1-7, in Defendant's Appendix at 363-64. Dewberry's subjective belief that he was discriminated against is insufficient to withstand TU Electric's motion for summary judgment. See *Price*, 119 F.3d at 337 (holding that summary judgment was appropriate where the plaintiff's discrimination claims rested solely on conclusory allegations and the plaintiff's unsupported subjective belief that discrimination had occurred); see also *Douglass*, 79 F.3d at 1430. The court concludes that TU Electric is entitled to summary judgment because the evidence taken as a whole would not allow a jury to infer that the actual reason for TU Electric's refusal to promote Dewberry was discriminatory. See *Rhodes*, 75 F.3d at 994; see also *Bowens*, 1998 WL

292857 at *5 (holding that "without any evidence establishing a connection between the defendants' actions and [the plaintiff's] race, a verdict in favor of [the plaintiff] on his claims of discrimination would be insupportable as a matter of law.").

c. *The Mesquite Position*

With respect to the Mesquite position, Dewberry asserts (1) that he is a member of a protected group, African-American; (2) that he was qualified for the Mesquite position; (3) that he was not promoted to the Mesquite position; and (4) that TU Electric promoted a white male to the position. *See* Plaintiff's Brief at 11. TU Electric does not contest these facts. *See* Defendant's Brief at 35 (conceding that Dewberry has established a *prima facie* case of discrimination with respect to the Mesquite position). Thus, the court concludes that Dewberry has established a *prima facie* case of discrimination with respect to the Mesquite position.

As its legitimate, nondiscriminatory reason for not promoting Dewberry to the Mesquite position, TU Electric has offered evidence that Dewberry ranked significantly lower than the other interviewees with respect to leadership, interpersonal, and communication skills. *See* Defendant's Brief at 35-36. Specifically, TU Electric asserts that, during the interview for the position, Dewberry refused to answer questions from the panel, implied that some of the panel's questions were foolish, and accused the panel of having already made up its mind as to whom it would promote. See *id.* at 36. Kyle Davis ("Davis") and

Gilbert Rascon ("Rascon"), the two TU Electric management officials responsible for selecting a candidate to fill the Mesquite position, perceived Dewberry's conduct during the interview to be non-responsive, "rude and confrontational," and they concluded that Dewberry lacked the interpersonal and communication skills required for the position. *See* Affidavit of Gilbert Rascon ("Rascon Aff.") ¶ 8, in Defendant's Appendix at 167-68.

Dewberry accepts that TU Electric's stated reason for refusing to promote him to the Arlington position is legitimate and non-discriminatory. *See* Plaintiff's Brief at 13. Similarly, the court concludes that TU Electric has articulated a legitimate, nondiscriminatory reason for refusing to promote Dewberry to the Arlington position. Thus, because TU Electric has articulated a legitimate, non-discriminatory reason for its failure to promote Dewberry to the Mesquite position, the court must consider once more whether Dewberry has presented evidence sufficient to create a reasonable inference of discriminatory intent on the part of TU Electric. See *Grimes*, 102 F.3d at 141.

Again, however, Dewberry has failed to present any evidence that the real reason he was not promoted to the Mesquite position was because of his race. He merely relies on the evidence supporting his *prima facie* case and his subjective belief that he was discriminated against to satisfy his burden at this stage of the analysis. Such "proof," however, fails to create an issue of material fact for trial. Moreover, Dewberry admits that, during his interview, he accused the interviewers of having selected the candidate they were going to promote prior to beginning the interview process and that the interviewers

could have perceived his comments as rude and confrontational. *See* Dewberry Depo at page 251, lines 21-25 through page 252 lines, 1-11 and page 254, lines 17-25 through page 255, lines 1-13, in Defendant's Appendix at 380-81 and 383-84. Accordingly, TU Electric is entitled to summary judgment because the evidence taken as a whole would not allow a jury to infer that the actual reason for TU Electric's refusal to promote Dewberry was discriminatory. See *Bowens*, 1998 WL 292837, at *5 (holding that summary judgment is proper where the most favorable view of the evidence suggests only that the plaintiff is an African-American who suffered an adverse employment action, and not that the plaintiff suffered an adverse employment action because he is an African-American).

2. Retaliation

As with his claims of race discrimination, the court applies the *McDonnell Douglas/Burdine/St. Mary's* burden shifting framework to Dewberry's claims of retaliation. See *Grimes*, 102 F.3d at 143 (applying the burden-shifting framework to the plaintiff's retaliation claims); see also *Long v. Eastfield College*, 88 F.3d 300, 304 (5th Cir.1996) (stating that the burden-shifting structure is applicable to Title VII unlawful retaliation claims). This framework requires that if Dewberry establishes a *prima facie* case of retaliation, a presumption of discrimination arises, and TU Electric must articulate a legitimate, non-discriminatory reason for the failure to promote. See *Long*, 88 F.3d at 304-05. If TU Electric satisfies its burden of production, Dewberry must prove the ultimate issue of retaliation by

showing that the reason offered is a pretext for prohibited discrimination. *Long*, 88 F.3d at 305.

To establish a prima facie case of retaliation, Dewberry must show (1) that he engaged in an activity protected under Title VII; (2) that an adverse employment action occurred; and (3) that there was a causal connection between the protected activity and the adverse employment decision. See *Long*, 88 F.3d at 304; *Gonzalez*, 907 F.2d at 578. An employee engages in an activity protected by Title VII if he opposes allegedly discriminatory practices by the employer or participates in a proceeding, charge, or hearing where such practices are challenged. See *Long*, 88 F.3d at 304; see also *DeAnda v. St. Joseph Hospital*, 671 F.2d 850, 852 n. 1 (5th Cir. 1982). Adverse employment actions include discharges, demotions, reprimands, refusals to hire, and refusals to promote. *Pierce v. Texas Department of Criminal Justice, Institutional Division*, 37 F.3d 1146, 1149 (5th Cir.1994), *cert. denied*, 514 U.S. 1107 (1995). To establish the requisite causal link, Dewberry must show that the adverse action was based at least in part on TU Electric's knowledge of his protected activity.

a. *The Arlington Position*

With respect to the Arlington position, Dewberry asserts (1) that he complained to TU Electric management officials about discrimination in the selection process for the Lead Technician positions; (2) that TU Electric refused to promote him to the Arlington position; and (3) that the TU Electric management official who refused to promote him was aware of his complaints to other TU Electric

officials. *See* Plaintiff's Brief at 10. TU Electric admits that, at the time the successful candidate was awarded the Arlington position, the management official who refused to promote Dewberry was aware of Dewberry's complaints regarding the selection process for the Lead Technician positions and thus does not dispute that Dewberry has established a *prima facie* case of retaliation. *See* Defendant's Brief at 39. Therefore, the court concludes that Dewberry has established a *prima facie* case of retaliation with respect to the Arlington position. See *Bowens*, 1998 WL 292837, at *5-6 (recognizing that knowledge of prior complaints and a close timing between the protected activity and the adverse employment action will suffice to establish the *prima facie* causal link).

As discussed above with respect to Dewberry's complaints of racial discrimination, TU Electric maintains that it declined to interview Dewberry for the Arlington position because he lacked prior supervisory experience. *See* Defendant's Brief at 33. Dewberry concedes that this reason constitutes a legitimate, non-retaliatory reason for failing to promote him to the Arlington position. *See* Plaintiff's Brief at 12-13. The court likewise concludes that TU Electric has articulated a legitimate, non-retaliatory reason for refusing to promote Dewberry to the Arlington position.

To withstand summary judgment on this claim, therefore, Dewberry must produce evidence that would allow a reasonable jury to find that unlawful retaliation, not the superior qualifications of others, was the "cause in fact" of his injury. The "cause in fact" analysis of pretext requires proof of a significantly stronger relationship between the adverse employment action and the alleged

retaliation than is required to support Dewberry's *prima facie* case. *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 n.8 (5th Cir. 1998); *Long*, 88 F.3d at 305 n.4; *McDaniel v. Babbitt*, 1998 WL 75886 at *4 (N.D. Tex. Feb. 11, 1998), *aff'd* 163 F.3d 1355 (5th Cir. 1998) (table). Rather than merely showing some possible relationship, the "ultimate issue of retaliation requires the employee to prove that the adverse employment action would not have occurred 'but for' the protected activity." *Sherrod*, 132 F.3d at 1122.

Thus, to survive summary judgment at this stage, Dewberry must show that TU Electric engaged in illegal retaliation and "but for" TU Electric's retaliation, Dewberry would have been promoted. See *Sherrod*, 132 F.3d at 1122. Dewberry, however, has presented no evidence to show that, absent his complaints about the selection process, he would have been promoted to the Arlington position. Moreover, Dewberry admits in deposition testimony that he has no facts to support his allegation that he was denied an interview based on his prior complaints of discrimination. *See* Dewberry Depo. at page 231, lines 8-21, in Defendant's Appendix at 364. Thus, TU Electric is entitled to summary judgment. See *Grimes*, 102 F.3d at 143 (holding that summary judgment was proper because the employer concluded that a candidate who possessed better supervisory skills was more qualified for a position than the plaintiff and the plaintiff failed to show that "but for" her prior complaint of discrimination she would have been promoted).

b. *The Mesquite Position*

With respect to the Mesquite position, Dewberry asserts (1) that he filed a charge of discrimination with the EEOC in February 1998, alleging that he was not promoted to the Arlington position because of his race, in violation of Title VII and the TCHRA; (2) that TU Electric refused to promote him to the Mesquite position; and (3) that the TU Electric management officials who refused to promote him were aware of his complaints to TU Electric management officials about discrimination in the selection process for the Lead Technician positions and the February 1998 EEOC charge. *See* Plaintiff's Brief at 11. TU Electric disputes Dewberry's allegation that Rascon and Davis, the TU Electric officials who were responsible for filling the Mesquite position, were aware that Dewberry had made internal complaints regarding the selection process for the Lead Technician position or that Dewberry had filed the February 1998 charge. *See* Defendant's Brief at 41. TU Electric points to evidence in the summary judgment record which supports its contention that Rascon and Davis had no knowledge of Dewberry's complaints and argues that Dewberry has failed to establish a *prima facie* case of retaliation with respect to the Mesquite position. *See* Rascon Aff. ¶ 11, in Defendant's Appendix at 169; Affidavit of Kyle Davis ("Davis Aff.") ¶ 15, in Defendant's Appendix at 175.

Even if it is assumed, *arguendo*, however, that Dewberry has presented a *prima facie* case of retaliation with respect to the Mesquite position, his claim fails for want of evidence from which a reasonable jury could conclude that the legitimate reasons offered by TU Electric were pretexts for retaliation. TU Electic [sic] has stated that,

during his interview, Dewberry refused to answer questions from the panel, implied that some of the panel's questions were foolish, and accused the panel of having already made up its mind as to whom it would promote. *See* Defendant's Brief at 36. Based on this conduct, Rascon and Davis concluded that Dewberry lacked the leadership, interpersonal, and communication skills required for the position. See *id; see also* Rascon Aff. ¶¶ 8 and 12, in Defendant's Appendix at 167-69; Davis Aff. ¶¶ 9 and 12, in Defendants' Appendix at 173-74. This is a legitimate explanation for TU Electric's refusal to promote Dewberry to the Mesquite position. *See also* Plaintiff's Brief at 13 (acknowledging that TU Electric's stated reasons for refusing to promote Dewberry to the Mesquite position is a legitimate, non-retaliatory reason).

In response, Dewberry has failed to present any evidence showing that, in the absence of his prior complaints, he would have been the successful candidate. Without such proof, the court cannot conclude that a reasonable jury could find that unlawful retaliation was the cause-in-fact of Dewberry's failure to be promoted to the Mesquite position. Accordingly, TU Electric is entitled to summary judgment. See *Grimes,* 102 F.3d at 143; see also *McDaniel,* 1998 WL 75886 at *4.

III. CONCLUSION

Dewberry has failed to carry his burden of producing evidence on the basis of which a reasonable jury could conclude that TU Electric's legitimate reasons for refusing

to promote him were a pretext for discrimination or retaliation. Thus, TU Electric's motion for summary judgment is **GRANTED.**

SO ORDERED.

July 15, 1999.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

Supreme Court, U.S.
FILED
JUL 17 2000
CLERK

(2)

No. 99-1847

IN THE

Supreme Court of the United States

WILLIAM C. DEWBERRY,

Petitioner,

v.

TEXAS UTILITIES ELECTRIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Texas Utilities Electric Company is now known as TXU Electric Company. It is a wholly-owned subsidiary of TXU Corp. TXU Corp. is a publicly held company, having no known parent company.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

The United States District Court for the Northern District of Texas, Dallas Division, issued its Memorandum Order, dated July 15, 1999, granting Texas Utilities Electric Company's ("Respondent") Motion for Summary Judgment and dismissing Petitioner's claims. (Pet. App. A-3).[1]

The Petitioner appealed the decision to the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit"). The Fifth Circuit affirmed the district court's order granting summary judgment in favor of Respondent, per curiam, by order dated February 17, 2000. (Pet. App. A-1).

STATEMENT OF THE CASE

Petitioner brought this suit pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e ("Title VII"), the Civil Rights Act of 1991, as amended, 42 U.S.C. § 1981, and the Texas Commission on Human Rights Act, Texas Labor Code § 21.051 (Vernon 1996), claiming that he was discriminatorily denied a promotion to three positions based on his race, color and national origin.[2]

Petitioner's representations to this Court of certain facts are misleading, and in some instances, inaccurate. Because Petitioner was represented by different counsel before the district court, Respondent provided Petitioner the benefit of the doubt during the proceedings before the Fifth Circuit and kindly pointed out to Petitioner and his counsel the factual misrepresentations made to the Fifth Circuit. Despite this, Petitioner makes the same representations to this Court.

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1. All references or citations to "Pet. App." refer to the Appendices contained in the Petition for Writ of Certiorari.

2. Petitioner also claimed below that he was denied two of the three promotions in retaliation for his prior complaints of discrimination. In his Petition for Writ of Certiorari, however, Petitioner fails to challenge the lower courts' decisions granting summary judgment on his retaliation claims and, accordingly, the propriety of dismissing such claims is not an issue presented to this Court.

Petitioner's misrepresentations of the facts are addressed in Respondent's Statement of the Case, as well as in it's discussion concerning the reasons this Court should deny the writ.

(FACTS)

Respondent is a public utility that generates, transmits and distributes electricity. Petitioner has been employed by Respondent or its predecessor company since June 13, 1967. Petitioner currently works as a Senior Engineering Technician (hereinafter "Senior Technician") in Respondent's distribution division. The job duties of a Senior Technician consist primarily of providing technical support and advice to distribution crews with respect to the construction, operation and maintenance of Respondent's electrical distribution systems. During the time period relevant to Petitioner's claims, he was employed in Central Region — — one of five regions within the distribution division. (R2. 143: ¶¶ 5-7; R2. 147 ¶ 7; R2. 217: 7-9; R2. 237: 9-10; R2. 281: 1-10, 21-25).

I. THE CENTRAL REGION LEAD TECHNICIAN POSITION.

In the Spring of 1997, Central Region was restructured to create a Lead Technician position at each of the three service centers in the region. Prior to that time, the highest step of progression in Central Region's technician job classification was Senior Technician. Gary Roberts, Manager of Central Region, approved the restructuring because the Lead Technician position had a slightly higher salary range and afforded technicians the ability to acquire leadership and supervisory experience. Lead Technicians are responsible for performing technical work typically performed by Senior Technicians, and also performing leadership and supervisory-type duties, such as assigning work orders to other technicians, evaluating the performance of employees in the technician classification, and addressing and resolving customer complaints. (R2. 122: ¶ 6; R2. 144 ¶¶ 9, 11).

A. The Selection Process

All 11 Senior Technicians in Central Region, including Petitioner, were interviewed, and considered for, the position of Lead Technician. Ralph Reeves, Southwest Service Center Manager, took the lead role in overseeing the selection process, and assembled an interview panel comprised of the manager and operations supervisor from each of the three service centers in Central Region. Because the primary difference between the Senior Technician and Lead Technician positions is the supervisory-type duties Lead Technicians are responsible for performing in addition to the technical work, the Interview Panel placed an emphasis on selecting the candidates who possessed not only good technical skills, but demonstrated superior communication and leadership abilities. (R2. 16: ¶ 15; R2. 124: ¶ 14).

During the interview process, Mr. Reeves asked each candidate a list of questions he had designed to enable the Interview Panel to evaluate and compare each candidates' ability to communicate and articulate their ideas effectively, and to assess their potential leadership abilities. Mr. Reeves also formulated a selection grid to assist the Interview Panel in selecting the most qualified candidates, which contained the following criteria: (i) communication; (ii) leadership; (iii) knowledge (technical knowledge); (iv) attitude; (v) experience (years of experience as a technician); (vi) respect (respect by, and to, peers and supervisors); and (vii) planning ability. (R2. 124: ¶¶ 12, 13; R2. 141). Similarly, Mr. Vestal, North Service Center Manager, developed a list of topics related to the Lead Technician position that he was prepared to discuss, or ask the candidates questions about, during the interview. (R2. 14: ¶ 10; R2. 21).

After completing the interview process, the Interview Panel initially took a straw poll to determine how each member had preliminarily ranked the candidates. No one on the Interview Panel had ranked Petitioner in the top three. (R2. 15-16: ¶ 14; R2. 17: ¶ 21; R2. 125: ¶¶ 15, 16; R2. 152: ¶ 9; R2. 455: 16-20,

2-11). It was the consensus opinion of the Interview Panel that, during the interview Petitioner did not give specific answers to their questions, or gave very vague answers, and did not articulate his ideas effectively. For example, each candidate was asked what he or she would do to improve system performance or reliability in the distribution operations group. Most all of the candidates responded with some type of plan they would focus on to improve customer reliability, and approximately fifty-percent responded with specific ideas such as increasing tree trimming, improving feeder maintenance, and performing other various maintenance activities that increase reliability in providing electric service. Petitioner responded by stating: "I don't know. I would have to think about it." Accordingly, the Interview Panel concluded that Petitioner did not exemplify communication and leadership skills as good as the successful candidates.[3] (R2. 15: ¶ 12; R2. 17: ¶ 21; R2. 127: ¶ 21).

With respect to overall job knowledge and technical experience, the three successful candidates had *more* years of experience in the technician job classification than Petitioner. Rodger Leger had ten years *more* technician experience, and Bill Barnes and Darrell Berg had six years and three years *more* experience, respectively, than Petitioner. Furthermore, all three individuals, like Petitioner, had an Associates Degree in Applied Arts & Sciences, and had received equal or more favorable

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3. The Interview Panel also considered their own day-to-day work experiences in selecting the candidates with the most effective leadership skills. It had been Mr. Vestal's experience in supervising Mr. Barnes that he was considered to be the "informal leader" among the technicians at the North Service Center, and was often looked to for technical information, advice and direction. Furthermore, it was Mr. Reeves' perception that Petitioner was not as approachable as he should be to be an effective leader. On certain occasions in the past, Mr. Reeves had seen Petitioner at the Northeast Service Center and had spoken to, or acknowledged Petitioner with a greeting. Petitioner typically would not speak to Mr. Reeves, or would give a short, curt response and then just walk off. (R2. 17: ¶ 21; R2. 126: ¶ 19; R2. 127: ¶ 22).

performance evaluations than Petitioner over the past few years. (R2. 25: ¶¶ 8, 9; R2. 297).

Accordingly, the Interview Panel reached a consensus decision that Bill Barnes, Rodger Leger and Darrell Berg possessed superior technical, communication and leadership skills compared to the other candidates, including Petitioner, and were overall the most qualified candidates for the position. (R2. 18: ¶ 22; R2. 125: ¶ 17).

B. Petitioner's internal complaints of discrimination and Respondent's attempt to assist Petitioner in preparing for future promotion opportunities

Pursuant to Petitioner's request, Gary Roberts, Manager of Central Region,[4] met with Petitioner for approximately 2 hours to discuss the Interview Panel's selection process. Mr. Roberts explained to Petitioner that all three candidates: (i) had more years of technical experience, (ii) were exceptional performers, (iii) were considered to be the "informal leaders" in their respective work groups, (iv) were often looked to for advice and direction from other technicians based on their technical knowledge, and (v) had exhibited leadership abilities. Mr. Roberts also gave Petitioner feedback on the areas in which he could improve his performance and his ability to be promoted in the future. Specifically, Mr. Roberts told Petitioner that he should focus on improving his leadership, communication and interview skills. (R2. 146: ¶¶ 16, 17, 18; R2. 309: 22-25; R2. 310: 1-7; R2. 315: 8-24; R2. 441). Based on Mr. Roberts' own personal observations, the successful candidates had positive attitudes and were approachable by their co-workers. Mr. Roberts had personally observed Petitioner, however, being rude and confrontational to an instructor during a leadership training course a few years before, and had recently witnessed

4. Petitioner incorrectly states that Mr. Roberts was a member of the Interview Panel. (Petition for Writ of Certiorari ("Pet.") p. 6). Mr. Roberts was the Manager of Central Region and the members of the Interview Panel reported to him. (R2. 142: ¶ 3; R2. 145: ¶ 13).

Petitioner's refusal to participate in a Safety Bingo session during a recent Company safety meeting. Mr. Roberts explained to Petitioner that leaders lead by example and that this type of conduct was not indicative of a leader. In addition, Mr. Roberts emphasized the importance of continual training to improve his opportunities for promotion.[5] Petitioner responded that he "was not interested" in taking any more "damn training." (R2. 146: ¶¶ 12, 18; R2. 147: ¶ 19).

Petitioner subsequently met with Mr. Roberts' immediate superior, Paul Williams, Vice President of Distribution. After their meeting, Mr. Williams requested that Mr. Roberts assist Petitioner in preparing for future promotion opportunities by directing Petitioner's supervisor to: (i) arrange additional training for Petitioner that would improve his potential for future promotions, and (ii) evaluate Petitioner's performance and discuss the evaluation with Petitioner. With assistance from the Company's training and development department, Petitioner's supervisor, Ritchie Croft, identified two training programs for Petitioner to attend that focused on teaming with co-workers and personal effectiveness. He also completed an evaluation of Petitioner's performance as a Senior Technician. On August 19, 1997, Mr. Croft met with Petitioner to discuss the training programs and the recently completed performance evaluation. (R2. 147: ¶ 21; R2. 155: ¶¶ 20, 21; R2. 323: 14-25, R2. 326: 5-9, 17-21; R2. 327: 9-20; R2. 332: 22-25; R2. 333: 1-22; R2. 334: 8-14).

Petitioner subsequently sent an internal e-mail to Erle Nye, Chairman of the Board and Chief Executive Officer of Texas

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5. The successful candidates had participated in several training classes in which Petitioner had chosen not to participate. Mr. Roberts expressed to Petitioner his disappointment in Petitioner's decision not to participate in the Company's Craft Advancement Progression Skills Training Program ("CAPS"). Other technicians with an Associates Degree, including Mr. Barnes and Mr. Berg, participated in CAPS and had learned valuable information concerning distribution operations. (R2. 147: ¶¶ 19, 20; R2. 324: 5-22).

Utilities Company, requesting that Mr. Nye review the selection process for the Lead Technician position. (R2. 2: ¶ 6). Petitioner's request was forwarded to Ms. Debbie Dennis, Human Resources Support and Diversity Manager, and Ms. Dennis subsequently met with Petitioner to discuss his concerns about the selection process. During the meeting, Petitioner requested a comparison chart that reflected his qualifications in comparison to the successful candidates. When Ms. Dennis attempted to schedule a follow-up meeting with Petitioner to present him with the comparison chart he refused to meet with her. Petitioner told Ms. Dennis that unless she had a supervisor position for him, there was no need for them to meet. (R2. 2: ¶¶ 6, 7; R2. 3: ¶ 8; R2. 338: 23-25; R2. 339: 1-4; R2. 340: 12-16; R2. 346: 23-25; 347: 1-2, 3-15, 21-23). Subsequently, Ms. Dennis arranged for John Self, Economic and Business Development Manager, an African-American male, to contact Petitioner to discuss Petitioner's concerns and to offer career mentoring. Petitioner, however, refused to meet with Mr. Self. (R2. 3: ¶ 10).

II. THE ARLINGTON SUPERVISOR POSITION

In November 1997, an opening existed for a Distribution Operations Supervisor in the Arlington Service Center (the "Arlington Supervisor"). The hiring manager, Ralph Reeves,[6] posted the job opening through the Company's internal process for promotions and transfers (hereinafter the "APT Process"). (R2. 27 ¶ 14; R2. 131: ¶¶ 35, 36). The position description posted was a standard, company-wide job description for the operations supervisor job classification, and contained the minimum qualifications of the position. Because the successful candidate would be responsible for supervising approximately 21 employees and several contract workers, Mr. Reeves also

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6. A few months after the selection process for the Lead Technician position in Central Region, Mr. Reeves transferred to the Arlington Service Center in Fort Worth Region to serve as the Systems Operations Manager.

identified prior lead or supervisory experience as an essential criteria in selecting the successful candidate. (R2. 27: ¶ 15; R2. 132: ¶ 37).

Approximately 37 employees, including Petitioner, submitted an application for the position, 15 of which had prior job experience in a supervisory or lead capacity. Accordingly, Mr. Reeves and Ms. Morton, the personnel representative, determined that it would be appropriate to interview only those applicants who possessed prior supervisory experience. Because Petitioner had no prior lead or supervisory experience, he was one of the approximately 27 applicants who were *not* interviewed. Jerry Griffin, a 27-year employee of Respondent, was selected for the position. Mr. Griffin possessed an Associates Degree, and almost eight years of prior supervisory experience. Mr. Reeves concluded that, based on Mr. Griffin's work experience and his conduct during the interview process, he was the most qualified candidate for the position. (R2. 13: ¶ 40; R2. 28: ¶¶ 17, 19, 20; R2. 29: ¶ 22; R2. 131: ¶ 35; R2. 132: ¶ 39; R2. 133: ¶ 41; R2. 357: 12-25; R2. 358: 21-24).

III. THE MESQUITE LEAD TECHNICIAN POSITION

In April 1998, an opening existed for a Lead Technician position at the Mesquite Service Center in the Company's Northern Region (the "Mesquite Lead Technician"). Eighteen employees submitted an application through the APT Process, and 11 of the applicants were interviewed, including Petitioner. They were interviewed by a three-member panel: Gilbert Rascon, Mesquite Distribution Operations Manager, Kyle Davis, Mesquite Distribution Operation Supervisor, and Tom Wooten, Repair and Construction Supervisor. In selecting the successful candidate, they considered the following criteria: (i) job knowledge; (ii) leadership skills; (iii) qualifications; (iv) interpersonal skills; and (v) communication skills. (R2. 29: ¶ 25; R2. 166: ¶ 5; R2. 167: ¶ 5; R2. 171: ¶ 3; R2. 172: ¶ 6; R2. 180; R. 366: 4-16; R2. 367: 8-10; R2. 368: 4-9).

Prior to the interview process, Mr. Davis formulated a list of ten questions to ask each of the candidates. After Petitioner had been asked a few of the questions, he inquired as to who had formulated the questions and implied the questions were somewhat foolish. Petitioner also questioned the panel as to how they could possibly select a candidate based on a 30-40 minute interview, and then implied that the panel had already selected the candidate it desired to promote prior to the interview process. Mr. Rascon explained to Petitioner that the panel most definitely had not reached a decision as to who to promote, and that, in selecting the candidate, it would consider not only the interview process, but each candidate's work experience and qualifications included on their application. When Mr. Rascon asked Petitioner additional questions, he did not respond or gave brief, curt responses, and then simply referred the panel to his personnel file. The members of the interview panel were stunned by Petitioner's interview. They perceived Petitioner's conduct toward them to be rude, confrontational and non-responsive, and concluded he did not possess the requisite interpersonal and leadership skills necessary for the position.[7] (R2. 166: ¶ 5; R2. 167-168: ¶¶ 7, 8; R2. 173: ¶¶ 7, 8, 11; R2. 380: 21-25; R2. 381: 1-11).

Subsequent to Petitioner's interview, Mr. Wooten informed Mr. Rascon and Mr. Davis that he had observed a tape-recorder in Petitioner's briefcase that had remained open during the interview. Based on this fact, Mr. Rascon requested Mr. Davis to make a written record of the events that occurred during the interview. Petitioner represents to the Court that Mr. Davis recorded the interview with Petitioner. (Pet. p. 11). This is inaccurate and misleading to the Court. It was Petitioner, not Mr. Davis, who tape-recorded the interview, and Petitioner admitted in his deposition that he secretly taped the interview. (R2. 168: ¶ 9; R2. 173: ¶ 10; R2. 178; R2. 390-395).

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7. If Petitioner had not approached the interview process in the manner that he did, based on his job knowledge and experience, he would have been one of the top 2 or 3 candidates. (R2. 169: ¶ 12; R2. 173: ¶ 11).

After the conclusion of the interview process, Dennis Norman was selected for the position. Mr. Norman had been employed by Respondent, or its predecessor, since 1968, and had 5 years experience as a technician. Mr. Rascon and Mr. Davis concluded that Mr. Norman clearly had superior communication, leadership and interpersonal skills. (R2. 169: ¶ 13; R2. 174: ¶ 12).

REASONS FOR DENYING THE WRIT

I. THE WRIT SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT'S DETERMINATION THAT SUMMARY JUDGMENT FOR RESPONDENT WAS PROPER IS CONSISTENT WITH THIS COURT'S RULING IN *REEVES v. SANDERSON PLUMBING PRODUCTS, INC.*

The evidentiary framework for analyzing an employment discrimination case brought under Title VII was set forth initially by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Under this framework, the plaintiff bears the initial burden of proving a *prima facie* case of discrimination by a preponderance of the evidence. *Id.* at 1824. If the plaintiff proves a *prima facie* case, a presumption of intentional discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 508-09, 113 S. Ct. 2742, 2747 (1993) (*citing*, *McDonnell Douglas*, 411 U.S. 792). If the defendant comes forward with a legitimate, non-discriminatory reason for its actions, the inference of discrimination raised by the plaintiff's *prima facie* case is dissolved, and the burden then shifts back to the plaintiff to prove that the employer's articulated reasons are a pretext for unlawful discrimination. *St. Mary's*, 509 U.S. at 515-17.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), this Court recently clarified its holding in *St. Mary's* regarding a plaintiff's

evidentiary burden in proving pretext and sustaining a finding of liability for intentional discrimination under the Age Discrimination in Employment Act ("ADEA").[8] The Court held that a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, *may*, but will not always, permit the trier of fact to conclude that the employer unlawfully discriminated. *Reeves*, 120 S. Ct. at 2109.

In *Reeves*, the plaintiff was 57 years old when his employment was allegedly terminated for failing to maintain adequate attendance records. In support of its termination decision, the employer contended, among other things, the plaintiff's inadequate recordkeeping posed a serious problem for the company because it could result in expensive union grievances and arbitration cases and cost the company money in overpaid wages. *Id.* at 2107. At trial, however, the plaintiff put forth substantial evidence, some of which was undisputed, that the employer's proffered reason was false, including evidence that: (i) the plaintiff had properly maintained attendance records; (ii) the company's automated timeclock frequently malfunctioned and failed to scan employees' timecards properly, which could account for the errors in the records; (iii) the plaintiff's manager, not plaintiff, was responsible for citing employees for attendance violations; (iv) the plaintiff's manager, not plaintiff, was responsible for the overpayment of an employee who should have been reported as absent; (v) not a single union grievance or employee complaint had arisen from plaintiff's record keeping; and (vi) the company had never even calculated the overpaid wages allegedly attributable to plaintiff's mistakes. *Id.* at 2107-08. Perhaps most importantly, the plaintiff also produced evidence that the

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8. Although *Reeves* involved the standard for granting judgment as a matter or law, under Fed. R. Civ. P. 50, as it applied to a claim for relief under the ADEA, Respondent recognizes that its holding also applies to the standard for granting summary judgment under Rule 56, and to claims for relief under Title VII and 42 U.S.C. § 1981, as well.

decisionmaker behind his termination harbored age-based animus toward him. Specifically, the decisionmaker told the plaintiff he "was so old [he] must have come over on the Mayflower" and that plaintiff "was too damn old to do [his] job." This Court held that, considering all of the evidence put forth by the plaintiff that the employer's proffered reason was false and the additional evidence that the decisionmaker harbored age-based animus against the plaintiff, a reasonable jury could find that the employer had engaged in unlawful discrimination. *Id.* at 2110-11. In so holding, the Court reversed the Fifth Circuit's grant of judgment as a matter of law for the employer.[9]

This Court emphasized, however, that not all cases would involve the magnitude of evidence put forth by the plaintiff in *Reeves*. *Id.* at 2109. In this regard, the Court stated, "certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* For instance, an employer would be entitled to judgment as a matter of law where "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision" and where **"the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."**[10] *Id.* (Emphasis added).

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9. The Court found that the Fifth Circuit's standard requiring the plaintiff to present "sufficient evidence that his age motivated [the employer's] employment decision" in order to sustain a jury finding of liability for unlawful discrimination was improper. As the Court stated, the Fifth Circuit "erred in proceeding from the premise that a plaintiff must always introduce additional independent evidence of discrimination." *Reeves*, 120 S. Ct. at 2109.

10. In determining whether an employer is entitled to judgment as a matter of law, relevant factors include "the strength of the plaintiff's

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Moreover, with respect to the plaintiff's burden of proving pretext, the Court reiterated that it is insufficient for the factfinder to merely disbelieve the employer's articulated reason; rather "the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 2108, *citing St. Mary's* at 519 (emphasis in original). Along these lines, the ultimate burden of proving intentional discrimination remains at all times with the plaintiff. *Id.* at 2106, *citing Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

In the case *sub judice*, the parties do not dispute that Petitioner has established a *prima facie* case and Respondent has articulated a legitimate, non-discriminatory reason for its decision not to promote Petitioner to the positions at issue. Thus, the sole issue is whether Petitioner has set forth sufficient evidence to prove that Respondent's articulated reason is a mere pretext for unlawful discrimination. *St. Mary's*, 509 U.S. at 508, 510-11. The district court, with affirmance by the Fifth Circuit, found that Petitioner failed to create a fact issue as to pretext and presented no evidence that he was not promoted because of his race, and based its grant of summary judgment for Respondent thereon. (Pet. App. A-14, 17, 19, 26). Despite this Court's subsequent holding in *Reeves*, Respondent submits that summary judgment for Respondent is still proper. This case clearly presents an instance where, as articulated by this Court in *Reeves*, no rational factfinder could possibly conclude that discrimination occurred. *See Reeves*, 120 S. Ct. at 2109. Petitioner has not created a single issue of fact as to whether Respondent's reasons for failing to promote him to the positions at issue are false. To the contrary, in support of his claims of discrimination, Petitioner relies merely on his own subjective and unsubstantiated beliefs that he was discriminated against,

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(Cont'd)

prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.* at 2109.

which are contradicted by the substantial evidence in the record. Accordingly, under *Reeves*, Petitioner is not entitled to relief on any of his claims and Respondent asserts that his Petition for Writ of Certiorari should be denied.

A. No Rational Factfinder Could Conclude That Petitioner Was Discriminatorily Denied A Promotion To The Lead Technician Position In Central Region Because Petitioner Has Created No Genuine Issue of Fact as to Pretext and There Is Ample Uncontroverted Evidence in the Record That Petitioner Was Not Subject to Discrimination.

The uncontroverted evidence establishes Petitioner was not discriminated against by Respondent in its selection for the Lead Technician position. As stated above, the six-member Interview Panel made a consensus decision that, based on the interview process and their knowledge concerning the candidates' work history, prior job performance and technical background,[11] Bill Barnes, Darrell Berg and Rodger Leger possessed superior qualifications with respect to the job-related criteria than the other candidates, including Petitioner.[12] Specifically, they concluded that the successful candidates possessed superior technical, communication and leadership skills in comparison to the other candidates. (R. 18: ¶ 22; R. 125: ¶ 17). Petitioner

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11. The members of the Interview Panel had been employed by the Company between 25 and 40 years, and had each worked with, or supervised, many of the candidates for the Lead Technician position. As a result, although each member of the Interview Panel was not familiar with the work history and background of each candidate, the Interview Panel, as a whole, was generally familiar with each candidates: (i) years of service in the technician job classification; (ii) educational background; (iii) work history and past performance evaluations; and (iv) technical abilities. (R. 126: ¶¶ 17, 19; R. 151: ¶ 7).

12. Petitioner admits that under these circumstances, the Interview Panel's decision would not be discriminatory. (R2. 249: 15-25; R2. 250: 1-2).

does not contest the propriety of these considerations by the Interview Panel. Indeed, he admits that in selecting individuals for the Lead Technician position, it was appropriate for the Interview Panel to consider criteria such as: communication skills; respect of peers; approachability by co-workers and subordinates; breadth of technical knowledge and experience; and length of service or experience in the technician job classification. Petitioner also admits that it would be appropriate to assess these skills and criteria by considering a candidate's: (i) performance during the interview process; (ii) past job performance and evaluations; and (iii) references from past supervisors. (R2. 218: 15-25; R2. 219; R2. 239: 3-9; R2. 240: 12-24; R2. 241: 21-25; R2. 244: 10-14; R2. 245: 22-25; R2. 246: 7-15; R2. 248: 15-25; R2. 249: 1-9; R2. 298: 1-12; R2. 378: 22-25; R2. 379: 1-7; R2. 380: 1-15).

Furthermore, Petitioner admits that he has no evidence that even suggests racial animus on the part of the Interview Panel:

> **Q:** [A]re there *any facts* which would support your contention or which support your contention *that the six individuals that were on the interview panel based their decision not to promote you on your race*?
>
> **A:** *I have no facts.*

(R2. 351: 24-25; R2. 352: 1-4). (Emphasis added). Petitioner also admits that, other than the fact he was not selected for the Lead Technician position and his belief he was more qualified, he has no evidence that any member of the Interview Panel has ever discriminated against him based on his race.[13] (R2. 353: 19-23; R2. 354: 13-25; R2. 355; R2. 356: 2-9, 15-25; 357: 1-11).

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13. When asked what evidence he had to support his claim that he had been discriminated against, Petitioner responded that he was black, the successful candidates were white, and he believes he was (Cont'd)

As his own testimony shows, Petitioner relies on nothing more than unsubstantiated allegations that he was more qualified than the successful candidates and empty accusations that the selection process was unfair to support his claim of discrimination. (Pet. p. 19). This is far from sufficient to show pretext — it is well-recognized that unsubstantiated assertions are not competent summary judgment-evidence. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (the non-movant may not rest on mere conclusory allegations and must do more than simply show some "metaphysical doubt as to the material facts"); *Grimes v. Tex. Dept. of Mental Health & Mental Retardation*, 102 F.3d 137, 139 (5th Cir. 1996), *citing*, *Douglas v. United Serv. Automobile Assoc.*, 79 F.3d 1415, 1429 (5th Cir. 1996) (*en banc*) ("conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the non-movant's burden").

1. There is no substantial disparity between the qualifications of Petitioner and the successful candidates and, therefore, any difference in the qualifications is insufficient to create an issue of fact as to pretext.

In an attempt to show pretext, Petitioner claims that he was more qualified than the successful candidates because he: (i) had been employed by Respondent "longer than the successful candidates;" (ii) had been working in the technician job since 1983; (iii) had more technical responsibility in terms of the number of feeders, transfer switches, and dual-feed customers located in his assigned territory; and (iv) had received an "outstanding" performance review in his most recent

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(Cont'd)

more qualified than the successful candidates. (R2. 414-416; R2. 417: 1-18). This is insufficient to create an inference of discriminatory intent. *See Price v. Marathon Cheese Corp.*, 119 F.3d 330, 337 (5th Cir. 1997); *Bowens v. U.T. Southwestern Med. Ctr.*, 1998 U.S. Dist. LEXIS 19423, *15-16 (N.D. Tex. May 29, 1998).

performance evaluation. (Pet. p. 4-7, 12). None of these claims is sufficient to create a fact issue as to pretext.

It is undisputed that Rodger Leger had more years of work experience with Respondent than Petitioner, and that all three of the successful candidates had between 3 to 10 years *more* experience in the technician job classification than Petitioner. Petitioner was promoted into the technician job classification in 1983, while Messrs. Leger, Barnes and Berg entered the technician job classification in 1973, 1977, and 1980, respectively. (R2. 3, 6; R2. 25: ¶¶ 8, 9; R2. 40). Even assuming, *arguendo*, Petitioner's statistics concerning the number of feeders, transfer switches and dual-feed customers assigned to him in his territory are correct, this does not indicate that he was more qualified or a better technician than the successful candidates. Each Senior Technician, including Petitioner, is assigned a particular territory within Central Region and due to the differences in a given territory (*i.e.*, commercial v. residential customers), one Senior Technician may have more feeders, transfer switches, or dual-feed customers in his or her particular territory than in others. This factor alone is not indicative as to which technician has better technical knowledge and experience and certainly is not reflective of which technician possesses superior leadership and communication skills. (R. 128: ¶ 26).

Petitioner's claim that he received an "outstanding" performance review by Mr. Croft on his most recent performance evaluation prior to the selection process (Pet. p. 4) is indisputedly false and misleading to the Court and, in any event, is not substantial evidence that he was more qualified than any of the successful candidates. In the performance evaluation to which Petitioner refers and cites to the record, he was rated as "competent" in his performance, *not* outstanding. (R3. 291, 295 (*See* XVI. Comments)). In addition, the evaluation was not conducted by Mr. Croft, but rather by Petitioner's prior supervisor, Wiley Beasley, in 1993 — almost four years prior to the selection process for the Lead Technician Position. (R3. 291, 295). Furthermore, Petitioner fails to direct the Court

to the prior performance evaluations of the successful candidates. In fact, all three successful candidates had received comparable or *more favorable* performance ratings than Petitioner on their past two performance evaluations. (R2. 25-26: ¶¶ 8, 9). Furthermore, the fact that Croft stated in Petitioner's August 1997 Performance Review that he was "ready for advancement" is not substantial evidence that the other candidates were not also ready for advancement or were not more qualified than Petitioner and, thus, is not sufficient evidence of pretext.[14]

At most, Petitioner shows that his technical skills are comparable to the successful candidates. He does not show that he was clearly better qualified. To find discriminatory intent in a failure to promote case, there must be a "*substantial disparity*" in the qualifications of the candidates. *See EEOC v. Louisiana Office of Community Servs.*, 47 F.3d 1438, 1445 (5th Cir. 1995) (*citing Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993)).

In any event, it is undisputed that the Interview Panel placed substantial emphasis on the candidates' communication and leadership skills. (R2. 125: ¶ 14; R2. 16: ¶ 15). Thus, even if the evidence supports a finding that Petitioner was "as technically qualified" as Messrs. Barnes, Berg and Leger, there is absolutely no evidence to support a finding that Petitioner has superior or even comparable leadership or communication skills. In fact, the evidence is clearly to the contrary.

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14. Again, Petitioner misleads the Court by asserting that Petitioner received Mr. Croft's August 1997 performance review prior to the selection process for the Lead Technician Position. (Pet. p. 4, 12). The selection process for the Lead Technician Position occurred in April 1997, and Croft's August 1997 performance review was conducted at the direction of Mr. Williams after Petitioner's complaints of not being selected for the position. (R2. 143: ¶ 8, 144: ¶ 9, 155: ¶ 21).

2. Petitioner's dissatisfaction with one of the criteria utilized by the Interview Panel and with certain aspects of the selection process is insufficient to create an issue of fact as to pretext.

Petitioner contends that, because Respondent acknowledges the successful candidates would have the opportunity to "acquire leadership and supervisory experience," the Interview Panel's decision to consider leadership skills in determining who to promote is suspect and evidences discriminatory intent. (Pet. pp. 5, 11). This argument is nonsensical. Obviously, an appropriate consideration when promoting an individual into a leadership role is the individual's demonstrated leadership skills and abilities, notwithstanding the fact that the candidate will have the opportunity to "acquire experience" in utilizing these skills if promoted.[15] A plaintiff cannot raise fact issues simply by attacking the employer's stated business reasons for its actions, but must instead demonstrate a nexus between the employment action and the alleged unlawful discrimination. *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 819 (5th Cir. 1993), *cert. denied*, 510 U.S. 976 (1993). *See also Guthrie v. Tifco Indus.*, 941 F.2d at 374, 378 (5th Cir. 1991), *cert. denied*, 503 U.S. 908 (1992) (recognizing that the intent of anti-discrimination statutes is not to be a vehicle for "judicial second-guessing" of an employer's business decisions or to turn courts into personnel managers). Clearly, Petitioner has not made such a showing and, thus, cannot create a fact issue as to pretext.

Petitioner also points to several facts surrounding the selection process, other than the selection criteria, which he believes show pretext. First, Petitioner contends that because each member of the Interview Panel did not review each candidates' personnel file prior to the interview process, the Interview Panel's claim to have considered the candidate's job

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15. In fact, Petitioner admitted that it was appropriate for the Interview Panel to consider each candidate's leadership skills in selecting the successful candidates for the position. (R2. 249: 15-25).

knowledge and experience is suspect. (Pet. p. 12). It is undisputed, however, that all eleven candidates interviewed and considered for the Lead Technician position reported to one supervisor and one manager on the Interview Panel. It is also undisputed that the members of the Interview Panel had been employed by Respondent between 25 and 40 years, and had worked with, or supervised, most of the candidates. As a result, the Interview Panel, collectively, was familiar with each candidates' job knowledge and experience. (R2. 16: ¶ 17, 21; R2. 126: ¶¶ 1, 19; R2. 151-152: ¶ 7; R2. 451; R2. 457).

Second, Petitioner claims Respondent's failure to post the Lead Technician position through its APT process evidences pretext. (Pet. pp. 5-6). Yet, because Central Region was merely reclassifying three of the eleven existing technicians to the new Lead Technician position, and was not increasing the overall number of technicians, Mr. Roberts, the Manager, made a business decision that it was not appropriate to post the position. Otherwise, in the event an applicant outside Central Region was selected for one of the three Lead Technician Positions, it would have necessarily resulted in the layoff of one of the current technicians in Central Region. (R2. 145: ¶ 12). Therefore, the decision not to post the position was actually to Petitioner's benefit and in no way creates a fact issue as to pretext for unlawful race discrimination.

Third, Petitioner claims that, because the members of the Interview Panel specifically remembered the interview question asked of each candidate concerning the candidate's ideas or proposals to improve system performance, the interviewers "colluded" in explaining their decision that the successful candidates possessed superior communication and leadership skills. (Pet. pp. 6, 12). Petitioner's unsupportable claim is inconsistent with the actions of the Interview Panel prior to, during, and after the interview process, and inconsistent with the undisputed summary judgment evidence. In this regard, Mr. Reeves testified that he formulated a list of questions to be used during the candidates' interviews, one of which related to the

candidate's suggested plan to improve Respondent's electric system's operations and reliability. Similarly, Mr. Vestal testified that he developed a list of topics to discuss during the interview, one of which involved improving system performance. (R2. 14: ¶ 10; R2. 124: ¶ 12; R2. 127: ¶ 21). The Interview Panel's recollection of the candidates' responses to this question is also consistent with Mr. Vestal's notes taken during the interview process, which reflect each of the candidate's responses to this particular question, including Petitioner's response that he would have to assess the situation at that time and think about it. (R2. 15: ¶ 12; R2. 21: Ex. A; R2. 32-39). Mr. Vestal also explained that this question, and the candidates' responses to it, stuck out in his mind more than the others because the question provoked a thought process with the interviewee and should have initiated some conversation between the interviewee and the Interview Panel concerning the operation and performance of Respondent's electric distribution system and how to improve the process. Indeed, most all of the candidates communicated to the Interview Panel some type of plan or item(s) they would focus on, while Petitioner merely stated: "I don't know. I would have to think about it." (R2. 15: ¶¶ 12, 13; R2. 127: ¶ 21). The fact that the Interview Panel was able to recall such a response is understandable given the circumstances and is clearly not sufficient to establish pretext.

Fourth, Petitioner claims that the statement allegedly made by his supervisor, Ritchie Croft, concerning what Petitioner needed to do to be rated a commendable performer evidences pretext. (Pet. pp. 7, 12). Croft testified that the analogy he often uses to explain to employees under his supervision regarding what is required to receive a commendable performance rating is that they have to "know where the rocks are, implying that they basically have to be able to walk on water." (R2. 158: ¶ 29). This was not a statement by Mr. Croft made only to Petitioner and certainly is not racial in nature. Even assuming, *arguendo*, this statement was made, at best, it shows

Mr. Croft could have answered the question more specifically. It does not in any way, however, support a finding of pretext for unlawful discrimination.

Finally, Petitioner claims that all six members of the Interview Panel were white, three of the eleven candidates were black, and three white males were selected. (Pet. p. 6). The other African American male candidate for the Lead Technician position, however, had only 10 years of experience in the technician job classification, which was significantly less than the 24, 20, and 17 years of experience of the three successful candidates. (R2. 130: ¶ 31). And, although the one African American female considered for the position had 18 years of technician experience, she voluntarily withdrew from consideration for the position upon learning that the successful candidates would be required to relocate to a different service center. (R2. 130: ¶ 31).

3. Petitioner rebuffed Respondent's attempts to assist him in improving his chances for future promotions.

Petitioner's claim of discrimination is undermined by the fact that after Petitioner was not selected for the Lead Technician position, Respondent attempted to assist Petitioner in improving his chances for future promotions. (R2. 146: ¶ 16; R2. 309: 22-25; R2. 310: 1-7; R2. 441). Subsequent to the selection process, Respondent met with Petitioner and, among other things, gave him feedback on his performance during the interview process. Specifically, Petitioner was told that he needed to focus on improving his leadership, communication and interview skills. (R2. 146: ¶¶ 17, 18; R2. 315: 8-24). He was also told that continual training would help improve his opportunities for promotion; the successful candidates for the Lead Technician positions had each participated in several training classes in which Petitioner had chosen not to participate. Petitioner's response to Respondent's suggestion, however, was that he "was

not interested" in taking any more "damn training." (R2. 146: ¶¶ 12,18; R2. 147: ¶ 19).

Despite Petitioner's hostility, Petitioner's supervisor, Ritchie Croft, identified two training programs for Petitioner that focused on teamwork and personal effectiveness and discussed these programs with Petitioner. (R2. 147: ¶ 21; R2. 155: ¶¶ 20, 21; R2. 323: 14-25, R2. 326: 5-9, 17-21; R2. 327: 9-20; R2. 332: 22-25; R2. 333: 1-22; R2. 334: 8-14). In addition, Debbie Dennis, Human Resources Support and Diversity Manager, met with Petitioner to discuss his concerns about the selection process and attempted to schedule a follow-up meeting to present Petitioner with the comparison chart of Lead Technician candidates he had requested. Yet, Petitioner rebuffed Ms. Dennis' offer, declaring that unless she had a supervisor position for him, there was no need for them to meet. (R2. 2: ¶¶ 6, 7; R2. 3: ¶ 8; R2. 338: 23-25; R2. 339: 1-4; R2. 340: 12-16; R2. 346: 23-25; 347: 1-2, 3-15, 21-23). Ms. Dennis also arranged for an African-American male in management to provide career mentoring to Petitioner, but Petitioner refused to meet with him. (R2. 3: ¶ 10). Clearly, Respondent went out of its way to alleviate Petitioner's concerns with the selection process and to help Petitioner improve his opportunities for future promotions. Respondent's efforts and suggestions, however, were met with hostility and rebuffed by Petitioner.

In conclusion, Petitioner's claim that he was discriminatorily denied a promotion to the Lead Technician position in the Central Region clearly constitutes an instance where, as articulated by the Court in *Reeves*, no rational factfinder could conclude discrimination occurred. *See Reeves*, 120 S. Ct. at 2109. Undoubtedly, Petitioner's laundry list of attempts to establish pretext pale in comparison to the evidence of pretext put forth by the plaintiff in *Reeves*. At the absolute best, Petitioner has created a *weak* issue of fact as to whether Respondent's articulated reason for not promoting him was false. Moreover, there is abundant evidence that Petitioner was treated in a fair and non-discriminatory manner. In fact, after Petitioner

was not selected for the position, Respondent offered Petitioner guidance in improving his chances for future promotions, including identifying training programs and arranging for Petitioner to have a mentor. Clearly, no rational factfinder could conclude Petitioner was discriminated against and, accordingly, summary judgment for Respondent is proper.

B. No Rational Factfinder Could Conclude That Petitioner Was Discriminatorily Denied a Promotion to The Arlington Supervisor Position Because Petitioner Has Created No Genuine Issue of Fact as to Pretext and There Is Ample Uncontroverted Evidence in the Record That Petitioner Was Not Subject to Discrimination.

Due to the large number of employees and contract workers that the Arlington Supervisor would be responsible for supervising, Mr. Reeves concluded, and Ms. Morton agreed, that prior supervisory or lead experience was an essential job-related criteria for the Arlington Supervisor position.[16] (R2. 131: ¶ 36; R2. 27: ¶ 15). Accordingly, Mr. Reeves and Ms. Morton decided to only interview applicants who possessed this requisite job qualification. Petitioner was one of the approximately 27 applicants who did not have prior supervisory or lead experience and, thus, were not interviewed for the position. The candidate selected was a 27-year employee who possessed eight years of prior supervisory or lead experience. (R2. 28: ¶ 17; R2. 132: ¶ 37; R.133: ¶ 41).

Petitioner admits that in determining who is the most qualified candidate for a supervisory position, prior supervisory or leadership experience is a reasonable criteria to consider. (R2. 225: 3-19). Indeed, Petitioner also admits that he has no

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16. It is consistent with the Company's hiring practices for the hiring supervisor to identify job-related criteria he or she believes to be essential to the particular position being filled and to identify the candidates to be interviewed, considered, and ultimately selected based on those criteria. (R2. 27: ¶ 15).

facts or evidence to support his discrimination claim. Petitioner testified:

> **Q:** Is there **anything else, other than the denial of the interview**, that you can point to right now **that indicates that [Mr. Reeves] was discriminating against you based on your race?** Anything other than denying the interview?
>
> **A: Other than denial of the interview, I have nothing.**

(R2. 363: 1-11; R2. 364: 1-7). (Emphasis added).

In an attempt to show pretext, Petitioner claims, without any citation to the record, that Mr. Reeves decided to interview an African American male, Moses Ward, only after discussions with Ms. Morton, and that Mr. Ward did not have supervisory experience nor had he applied for the position. (Pet. p. 8). This assertion is blatantly untrue and *completely unsupported* by the record. In fact, Mr. Ward *did* submit an application for the Arlington Supervisor position, and Mr. Ward was added to the interview list because Ms. Morton believed Mr. Ward had prior supervisory experience. During Mr. Ward's interview, however, Mr. Reeves learned Mr. Ward did not, in fact, have prior supervisory experience and, accordingly, he was not selected for the position. (R2. 133-34: ¶ 44). Clearly, Respondent's actions regarding Mr. Ward have nothing to do with, and in no way cast doubt upon, Respondent's reason for not interviewing Petitioner.

Petitioner also contends that another employee, Don Shipley, who had no previous supervisory experience, was promoted to a different supervisor position in the Company, and that this fact evidences pretext. (Pet. p. 13). This argument fails for several reasons. Petitioner fails to produce any evidence concerning the job duties of the supervisory position Mr. Shipley was promoted to, or the relative qualifications and experience of the other applicants. Furthermore, even assuming Mr. Shipley was promoted to a supervisor position without any prior supervisory experience, Petitioner fails to show how this relates

to the position Petitioner applied for, or to Mr. Reeves' business decision to promote a candidate with previous supervisory experience to the Arlington Supervisor position. It is well-recognized that an employer does not discriminate by hiring the most qualified candidate. *See Grimes*, 102 F.3d at 143. *See also Scales*, 181 F.3d at 709, 712 (narrowing the candidate pool with "additional individualized qualifications" that are applied to all candidates is not sufficient evidence of pretext and summary judgment is proper).

Petitioner has failed to create a fact issue as to whether Respondent's legitimate, non-discriminatory reason for not promoting him to the Arlington Supervisor position is a pretext for unlawful discrimination. (R3. 531-532). Therefore, because no rational factfinder could conclude that Petitioner was discriminated against, summary judgment for Respondent is proper.

C. No Rational Factfinder Could Conclude That Petitioner Was Discriminatorily Denied a Promotion to The Mesquite Lead Technician Position Because Petitioner Has Created No Genuine Issue of Fact as to Pretext and There Is Ample Uncontroverted Evidence in the Record That Petitioner Was Not Subject to Discrimination.

With respect to the Mesquite Lead Technician Position, the Interview Panel rated Petitioner significantly lower than most of the other interviewees with respect to leadership, interpersonal and communication skills. Again, as with the Lead Technician Position for Central Region and despite the fact that Respondent had specifically told Petitioner to focus on improving such skills, Petitioner's low evaluation in these areas was a result of the manner in which he conducted himself during the interview process. Specifically: (i) Petitioner inquired as to who formulated the interview questions and then, rather then answering the questions, alluded to the fact that they were foolish; (ii) Petitioner was unwilling to respond, or gave very

brief and curt responses, to certain questions and, instead, referred the Interview Panel to his personnel file to obtain the information; and (iii) Petitioner questioned the credibility of the Interview Panel and the interview process by accusing the panel of having already made up their minds prior to the interviews as to who they were going to give the job. (R2. 167: ¶¶ 7, 8; R2. 172-173: ¶ 7; R2. 380: 21-25; R2. 381: 1-11).

Understandably, Mr. Rascon and Mr. Davis perceived Petitioner's conduct during the interview to be rude, confrontational and non-responsive, and concluded that Petitioner did not possess the requisite interpersonal, communication and leadership skills for the position. (R2. 167-168: ¶ 8; R2. 173: ¶¶ 8,11). Indeed, Petitioner does not dispute that he accused the interviewers of having selected who they were going to promote *prior* to the interview process and admits that the interviewers could have perceived his comments as questioning their integrity. (R2. 380: 21-25; R2. 381: 1-11; R2. 383: 17-25; R2. 384: 1-13).

In an attempt to show pretext, Petitioner claims that he had superior qualifications and technical experience than Mr. Norman. (Pet. p. 8). However, the members of the Interview Panel testified that while they viewed Mr. Norman's and Petitioner's technical skills as comparable,[17] Petitioner's rude and hostile behavior during his interview rendered him clearly *less* qualified than Mr. Norman for the position. Petitioner's unsubstantiated contentions are insufficient to show that the Interview Panel's reasons for its decision not to promote Petitioner to the Mesquite Lead Technician position are false. *See Scales*, 181 F.3d at 709, 712; *Price*, 119 F.3d at 337. Accordingly, because Petitioner has failed to create a fact issue as to pretext, summary judgment for Respondent is proper.

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17. The Interview Panel selected Dennis Norman, who had 12 years of experience as a technician, previous work experience in the Mesquite Service Center and familiarity with the distribution facilities in the region. Moreover, Mr. Norman exhibited strong interpersonal and leadership skills in his interview. (R2. 174: ¶ 12).

CONCLUSION

For all the above reasons, Respondent respectfully requests this Court to affirm the Fifth Circuit's decision that the district court properly granted Respondent's Motion for Summary Judgment in all respects and render that Petitioner's Writ of Certiorari be denied. In the event that this Court determines the Writ should not be denied based on its decision in *Reeves*, Respondent asserts, at a minimum, the Court should remand this case to the Fifth Circuit for further consideration in light of *Reeves*. Because the Fifth Circuit did not have the benefit of this Court's guidance in *Reeves* when it issued its February 17, 2000 opinion, under the circumstances, an order to remand the case to the Fifth Circuit would be an appropriate remedy, as opposed to a summary reversal in favor of Petitioner. In summary, Respondent asserts, however, that the Petitioner's Writ of Certiorari is without merit and should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

WILLIAM C. DEWBERRY,

Petitioner,

vs.

TEXAS UTILITIES ELECTRIC COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

I. This Court's Recent Decision in *Reeves v. Sanderson Plumbing Products, Inc.* Requires the Granting of this Petition.

Less than a month after this petition was filed, this Court issued its decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000). *Reeves* directly addresses the primary issue raised in this petition, and resolves it in Petitioner's favor.

Reeves, like this case, is an employment discrimination case arising out of the Fifth Circuit. The issue presented in *Reeves* is "whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a *prima facie* case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action." *Reeves*, 120 S. Ct. at 2103. This petition presents the identical issue.

Reeves resolves a conflict among the circuits on this issue. Several circuits had held that a *prima facie* case combined with sufficient evidence to reject the employer's explanation always creates a jury issue on intentional discrimination. *Reeves*, 120 S. Ct. at 2104-05 (and cases cited therein). The Fifth Circuit, on the other hand, had required additional direct evidence that the employer's real reason for its action was discrimination. *Id.*, *citing Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc). This petition cites the same conflict.

In *Reeves*, this Court expressly rejects the Fifth Circuit's requirement of additional direct evidence of

discrimination, and criticizes that Circuit for proceeding from "the assumption that a *prima facie* case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination." *Reeves*, 120 S. Ct. at 2108. *Reeves* goes on to explain that "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.*

In this case, as in *Reeves*, the Fifth Circuit held that the defendant employer was entitled to judgment as a matter of law because the plaintiff did not have any independent evidence of discrimination. (See Appendix A-14, A-17, A-19, A-23). Although the district court found that the plaintiff had established a *prima facie* case of discrimination (A-12, A-15, A-18), both the district court and the Fifth Circuit found it completely unnecessary to determine, or even to address, the issue of whether the defendant's articulated nondiscriminatory explanations for its decisions were false. Under *Reeves*, the lower courts' analyses are clearly erroneous, and this petition should be granted. "It suffices to say that, because a *prima facie* case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce independent, additional evidence of discrimination." *Reeves*, 120 S. Ct. at 2109.

II. This Court Should Decline Respondent's Invitation to Uphold the District Court's Summary Judgment on a Ground that was Never Addressed by Either the District Court or the Fifth Circuit.

In an attempt to bring this case within the requirements of *Reeves*, the Respondent argues that "the district court, with affirmance by the Fifth Circuit, found that Petitioner failed to create a fact issue as to pretext and presented no evidence that he was not promoted because of his race. . . . " *Brief in Opposition*, p. 13. This assertion is false and misleading in pertinent part. The district court's opinion *never* addresses the issue of whether there is sufficient evidence for the trier of fact to disbelieve the defendant's stated explanation. Instead, relying on the then-controlling Fifth Circuit precedent, the district court looked only for evidence: (a) that "race was the real reason for Respondent's failure to promote" (Appendix A-14); (b) of discriminatory intent (Appendix A-17, A-19); and (c) of racial animus (Appendix A-17). Just as the Fifth Circuit did in *Reeves*, the district court, in making this determination, "ignored the evidence supporting petitioner's *prima facie* case and challenging respondent's explanation for its decision." *Reeves*, 120 S. Ct. at 2108.

The Respondent nevertheless argues that this petition should be denied because "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Brief in Opposition*, p. 12, *citing Reeves*, 120 S. Ct. at 2109. Although it is well-established that an appellate court *may* affirm a judgment on grounds other than those relied upon by the lower court, *Helvering v.*

Gowran, 302 U.S. 238, 58 S. Ct. 154, 82 L. Ed. 224 (1937), it is also clear that an appellate court may decline to address an issue in the first instance. *See, e.g., Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999).

This Court should decline to review an issue on which neither the district court nor the Fifth Circuit has ruled. It should do so both to conserve its own judicial resources and to provide an early test of how the courts within the Fifth Circuit will apply *Reeves*. Doing so would permit this Court to simply grant the petition, reverse the judgment of the Fifth Circuit, and remand the case for further consideration in light of *Reeves*.

III. There is Sufficient Evidence for a Jury To Disbelieve Respondent's Stated Explanation for Not Promoting Petitioner.

A. How Can a Court Determine a Fact Issue to be "Weak" When it Cannot Weigh Evidence on Summary Judgment?

In the event that this Court chooses to determine whether there is sufficient evidence for the trier of fact to disbelieve the respondent-employer's stated explanations for its employment decisions, then it should take the opportunity to resolve what appears to be a lingering inconsistency in the standard set forth in *Reeves*.

Reeves reaffirms the long-standing summary judgment rule that a court "may not make credibility determinations or weigh evidence." *Reeves*, 120 S. Ct. at 2110. It emphasizes that "the weighing of evidence, and the drawing of legitimate inferences from the facts are jury

functions, not those of a judge." *Id.* Nevertheless, *Reeves* also states that judgment may be granted as a matter of law when a plaintiff creates "only a weak issue of fact as to whether the employer's reason was untrue and there [is] abundant and uncontroverted independent evidence that no discrimination [has] occurred." How can a court, on summary judgment, determine that a fact issue is "weak" without weighing evidence?

It is respectfully submitted that a court may not, consistent with the summary judgment standard, determine that a fact issue is weak or strong. Either a fact issue for the jury exists, or it does not. The reference to a "weak" fact issue on the falsity of the employer's explanation is also superfluous and unnecessary for this Court to set forth the proper circumstances under which the falsity of an employer's explanation will not permit an inference of intentional discrimination. There are two such circumstances: (1) the evidence conclusively establishes that the employer's explanation is a pretext for another, nondiscriminatory reason; and (2) there is independent and uncontroverted evidence negating discrimination. *See Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1291-92 (DC Cir. 1998) (en banc). Under either of these circumstances, it does not matter whether evidence of the falsity of the employer's explanation is strong or weak. Either way, discrimination has been conclusively negated and the employer would properly be entitled to judgment as a matter of law. Clarifying the holding of *Reeves* in this manner should also satisfy the concerns expressed by Justice Ginsburg in her concurring opinion in *Reeves*. *See, Reeves*, 120 S. Ct. at 2112 (J. Ginsburg, concurring).

B. Respondent's Articulated Non-Discriminatory Reasons are False.

Respondent's presentation of evidence in support of its nondiscriminatory explanations fails to properly apply the summary judgment standard of review, and fails to focus on the evidence that is relevant under *Reeves*. For example, Respondent relies heavily on Petitioner's candid admissions that he has no direct evidence of discrimination, just as the district court did. *Brief in Opposition*, pp. 15, 25. However, the very point of *Reeves* is that such evidence is not required. *Reeves*, 120 S. Ct. at 2109.

Respondent also argues, citing now-questionable Fifth Circuit authority, that a finding of discriminatory intent requires a "substantial disparity" in the qualifications of the candidates, while Petitioner's qualifications were merely comparable. *Brief in Opposition*, p. 18. However, Respondent's admission that Petitioner's qualifications were comparable to the selected candidates is sufficient evidence to permit a jury to disbelieve Respondent's stated explanation that it had doubts about his competency. This is all that is required under *Reeves*.

Respondent also argues, again citing now-questionable Fifth Circuit authority, that "a plaintiff cannot raise fact issues simply by attacking the employer's stated business reasons for its actions, but must instead demonstrate a nexus between the employment action and the alleged unlawful discrimination." *Brief in Opposition*, p. 19. This argument appears to fly in the face of the main holding in *Reeves*, which is that the falsity of the employer's reason alone, with a *prima facie* case, permits a finding of discrimination in most cases *without* requiring

additional evidence showing discrimination. *Reeves*, 120 S. Ct. at 2109.

Respondent also relies heavily on the testimony and subjective opinions of its own management personnel. *Brief in Opposition*, pp. 14, 18, 21, 23, 24, 26, 27. It also relies on allegations concerning conduct that occurred *after* the employment decisions were made, as if that could be relevant under any standard. *Brief in Opposition*, pp. 22-23.

Under a proper application of the summary judgment standard, a court "must disregard all evidence favorable to the moving party that the jury is not required to believe. [citation omitted]. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.' " *Reeves*, 120 S. Ct. at 2110.

Respondent has no disinterested witnesses, and the testimony provided by its management personnel was sufficiently contradicted or impeached to permit a jury to disbelieve it. Moreover, many of Respondent's interested witnesses claim to have relied on their own, unidentified personal experiences with the Petitioner, which a jury should not be compelled to believe.

Petitioner relies on the summary of the evidence and arguments showing the falsity of Respondent's explanations contained in his original petition.[1] *Petition for Writ of Certiorari*, pp. 11-13.

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[1] To the extent that its accuracy is challenged, Petitioner makes the following brief reply: Respondent states that

C. Petitioner's *Prima Facie* Case is Particularly Strong.

In addition to evidence casting doubt on the veracity of the employer's stated explanations for its decisions, the strength of the plaintiff's *prima facie* case is also a factor is determining whether an employer is entitled to judgment as a matter of law. *Reeves*, 120 S. Ct. at 2109. The Petitioner's *prima facie* case is particularly strong.

Respondent did not contest Petitioner's *prima facie* case for the Central Region Lead Technician positions, or the Mesquite Lead Technician position. What makes Petitioner's *prima facie* case particularly substantial, however, is that he is arguably far *more* qualified for these positions than the persons selected. After all, he had successfully handled far more technical responsibilities than the other candidates, and he was responsible for far more of Respondent's most important, high-profile customers. He was also apparently the only candidate with experience in resolving customer complaints, a key added responsibility to the new positions.

Respondent challenged Petitioner's *prima facie* case for the Distribution Supervisor position solely on the ground that he was unqualified. Respondent argued that the position required prior supervisory experience that

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Petitioner has misled the Court regarding the timing of Petitioner's performance review, which stated that he was "ready for advancement." *Brief in Opposition*, p. 18, n.14. However, the petition states, accurately, that the review covered the same period of time in which Petitioner was being denied promotion. It does not contend that the review occurred before Petitioner's complaint.

Petitioner did not have. However, Respondent admitted that the written job notice contained the required qualifications, and supervisory experience was not listed. Petitioner met the qualifications Respondent listed, and the district court correctly held that there was a *prima facie* case.

Another factor making Petitioner's *prima facie* case particularly strong is the fact that the same individual, Ralph Reeves, was responsible for hiring three of the lead technicians as well as the distribution supervisor. This is the individual who originally didn't even want to interview an African-American for the supervisor post, and who passed up all three African-Americans in a pool of only eleven for the three lead technician posts. This Court has cited as an example of a weak *prima facie* case a situation in which the hiring officer, as well as 40% of the employer's work force, were members of the same minority group as the plaintiff, even though the group in question comprised only 10% of the relevant labor market. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513 (1993). This case is almost the opposite: in one case, an all-white hiring committee, after bypassing Respondent's personnel department, passed over African-Americans who made up more than a quarter of the hiring pool, in order to give promotions to more than a quarter of the hiring pool. In another case, African-Americans were initially excluded from interviewing at all, and a token, unqualified African-American was added at the last minute.

The strength of Petitioner's *prima facie* case, combined with the substantial inconsistencies in Respondent's stated explanations, permit an inference of discrimination under *Reeves*. This case should be reversed and remanded to the district court for trial.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant this petition, and that upon final hearing it reverse the judgments of the Fifth Circuit and the trial court, and remand this case for trial on the merits. Petitioner prays for such further relief, at law or in equity, to which he may be justly entitled.

Respectfully submitted,

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